

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

MICHAEL RAVBAR & ANOR

PLAINTIFFS

AND

COMMONWEALTH OF AUSTRALIA & ORS

DEFENDANTS

Ravbar v Commonwealth of Australia
[2025] HCA 25
Date of Hearing: 10 & 11 December 2024
Date of Judgment: 18 June 2025
S113/2024

ORDER

The questions stated for the opinion of the Full Court in the special case filed on 18 October 2024 be answered as follows:

Question (1): Are Pt 2A of Ch 11 of the Fair Work (Registered Organisations) Act 2009 (Cth), s 177A of the Fair Work Act 2009 (Cth) and/or the Fair Work (Registered Organisations) Amendment (Administration) Act 2024 (Cth) invalid because they are not laws with respect to any head of power in ss 51 or 122 of the Constitution?

Answer: No.

Question (2): Are Pt 2A of Ch 11 of the Fair Work (Registered Organisations) Act 2009 (Cth), s 177A of the Fair Work Act 2009 (Cth) and/or the Fair Work (Registered Organisations) Amendment (Administration) Act 2024 (Cth) invalid because they impermissibly burden the implied freedom of political communication?

Answer: No.

Question (3): Is the Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024 (Cth) invalid because it is not authorised by Pt 2A of Ch 11 of the Fair Work (Registered Organisations) Act 2009 (Cth) by reason of the implied freedom of political communication?

Answer: No.

Question (4): Are Pt 2A of Ch 11 of the Fair Work (Registered Organisations) Act 2009 (Cth), s 177A of the Fair Work Act 2009 (Cth) and/or the Fair Work (Registered Organisations) Amendment (Administration) Act 2024 (Cth) invalid because they infringe Ch III of the Constitution?

Answer: No.

Question (5): Are Pt 2A of Ch 11 of the Fair Work (Registered Organisations) Act 2009 (Cth), s 177A of the Fair Work Act 2009 (Cth) and/or the Fair Work (Registered Organisations) Amendment (Administration) Act 2024 (Cth) invalid because they are laws authorising the acquisition of property otherwise than on just terms within the meaning of s 51(xxxi) of the Constitution?

Answer: No.

Question (6): Is s 323M of the Fair Work (Registered Organisations) Act 2009 (Cth) invalid because it authorises the acquisition of property otherwise than on just terms within the meaning of s 51(xxxi) of the Constitution?

Answer: No.

Question (7): Who should bear the costs of the special case (having regard, if appropriate, to s 329 of the Fair Work (Registered Organisations) Act 2009 (Cth))?

Answer: There should be no order as to costs.

Representation

B W Walker SC and C L Lenehan SC with C J Tran and N A Wootton for the plaintiffs (instructed by Hall Payne Lawyers)

S P Donaghue KC, Solicitor-General of the Commonwealth, and N M Wood SC with C G Winnett, T M Wood and M R Salinger for the first and second defendants (instructed by Australian Government Solicitor)

Submitting appearance for the third defendant

M J Wait SC, Solicitor-General for the State of South Australia, with B L Garnaut for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor (SA))

S K Kay SC, Solicitor-General for the State of Tasmania, with J L Rudolf for the Attorney-General for the State of Tasmania, intervening (instructed by Solicitor-General for the State of Tasmania)

G J D del Villar KC, Solicitor-General of the State of Queensland, with F J Nagorcka and K J E Blore for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law (Qld))

Michael Hiscox intervening, limited to written submissions

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Ravbar v Commonwealth of Australia

Constitutional law (Cth) – Legislative power – Implied freedom of political communication – Judicial power of Commonwealth – Acquisition of property on just terms – Where Construction and General Division ("C&G Division") of Construction, Forestry and Maritime Employees Union ("CFMEU") is organisation of employees registered under *Fair Work (Registered Organisations) Act 2009* (Cth) ("FWRO Act") – Where *Fair Work (Registered Organisations) Amendment (Administration) Act 2024* (Cth) inserted Pt 2A of Ch 11 into FWRO Act and s 177A into *Fair Work Act 2009* (Cth) – Where C&G Division of CFMEU and each of its branches placed under administration in accordance with Pt 2A of Ch 11 of FWRO Act – Where Attorney-General of Commonwealth determined *Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024* ("Scheme") – Where Administrator of Scheme appointed – Where during ongoing administration of C&G Division of CFMEU and its branches under Pt 2A of Ch 11 of FWRO Act, Administrator has and will continue to have powers of control, management and disposition of property of CFMEU previously used solely or predominantly for purposes of C&G Division or any of its branches – Where plaintiffs had been office holders in C&G Division of CFMEU until removed from offices as a result of Scheme – Whether impugned legislative provisions unsupported by head of Commonwealth legislative power – Whether impugned legislative provisions and/or Scheme infringed implied freedom of political communication – Whether impugned legislative provisions infringed Ch III of *Constitution* – Whether impugned legislative provisions effected "acquisition of property" within meaning of s 51(xxxi) of *Constitution* otherwise than on just terms.

Words and phrases – "acquisition of property", "administration", "best interests", "bill of pains and penalties", "collective will", "compensation", "constitutional corporations", "constitutionally prescribed system of representative government", "control", "detriments", "dysfunction", "effective burden", "efficient and democratic conduct", "extrinsic material", "foreseeable effects", "forfeiture", "head of power", "illegitimate purpose", "implied freedom of political communication", "intention", "invalidity", "judicial power", "legislative intent", "legislative purpose", "level of generality", "motive", "party-political donations", "prima facie punitive", "private correspondence", "property", "protective purpose", "public interest", "punishment", "reasonably appropriate and adapted", "reasonably capable of being seen as necessary", "shipwrecks clause", "single question of characterisation", "structured proportionality", "trade unions".

Constitution, ss 7, 24, 51(xx), 51(xxxi), Ch III.

Acts Interpretation Act 1901 (Cth), s 15A.

Fair Work Act 2009 (Cth), s 177A.

Fair Work (Registered Organisations) Act 2009 (Cth), Ch 11, Pt 2A.

Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024 (Cth).

1 GAGELER CJ. The *Fair Work (Registered Organisations) Amendment (Administration) Act 2024* (Cth) ("the FWROA Act") was enacted by the Commonwealth Parliament on 22 August 2024. From 23 August 2024, the FWROA has operated to insert Pt 2A of Ch 11 into the *Fair Work (Registered Organisations) Act 2009* (Cth) ("the FWRO Act"). Part 2A of Ch 11 of the FWRO Act makes provision for the Construction and General Division of the Construction, Forestry and Maritime Employees Union ("the CFMEU") and each of its branches to be placed under administration.

2 The CFMEU is an organisation of employees registered under the FWRO Act and is therefore a body corporate.¹ The registered rules of the CFMEU provide for the existence within the CFMEU of three Divisions, none of which is separately incorporated, each of which has "autonomy in relation to its funds and property", its own "divisional rules" and its own State and Territory branches.² The Construction and General Division is one of those Divisions.

3 The Revised Explanatory Memorandum for the FWROA Act referred to a litany of serious allegations of criminality, corruption and other misconduct on the part of current and former officers and employees of the CFMEU within the Construction and General Division,³ summarised its history of contraventions of industrial laws,⁴ and recorded that in the opinion of the General Manager of the Fair Work Commission "the majority of branches of the Division were no longer able to function effectively, including in the interests of members, and that there were no effective means under the relevant rules to address the situation".⁵ The Revised Explanatory Memorandum identified the legislative purpose of the FWROA Act as being "to end ongoing dysfunction within the Division and to ensure it is able to operate effectively in the interests of its members".⁶

1 Section 27(a) of the FWRO Act.

2 *Rules of the Construction, Forestry and Maritime Employees Union*, r 27.

3 Australia, House of Representatives, *Fair Work (Registered Organisations) Amendment (Administration) Bill 2024*, Revised Explanatory Memorandum at 3-4 [10].

4 Australia, House of Representatives, *Fair Work (Registered Organisations) Amendment (Administration) Bill 2024*, Revised Explanatory Memorandum at 3 [9].

5 Australia, House of Representatives, *Fair Work (Registered Organisations) Amendment (Administration) Bill 2024*, Revised Explanatory Memorandum at 3 [8].

6 Australia, House of Representatives, *Fair Work (Registered Organisations) Amendment (Administration) Bill 2024*, Revised Explanatory Memorandum at 4 [11].

4 Immediately following the insertion of Pt 2A of Ch 11 into the FWRO Act by the FWROA Act on 23 August 2024, the administration of the Construction and General Division of the CFMEU and each of its branches for which the Part makes provision was triggered by the occurrence of two events.⁷ The first was the determination of a scheme of administration by the Attorney-General of the Commonwealth, that being the *Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024* ("the Scheme").⁸ The second was the appointment by the General Manager of the Fair Work Commission⁹ of Mr Mark Irving KC ("the Administrator") to be the administrator of the Scheme.¹⁰

5 The first of those triggering events could only occur upon the relevant Minister (in this case, the Attorney-General) being "satisfied that, having regard to the Parliament's intention in enacting [the FWRO Act], it [was] in the public interest for the Division and its branches to be placed under administration".¹¹ The intention of the Parliament in enacting the FWRO Act, to which the Attorney-General, as the responsible Minister, was required to have regard in order to be satisfied that it was in the public interest for the Division and its branches to be placed under administration, is legislatively expressed as being "to enhance relations within workplaces between federal system employers and federal system employees and to reduce the adverse effects of industrial disputation", relevantly by requiring associations of employers and employees to "meet the standards set out" in the FWRO Act.¹² Those standards are further legislatively explained as existing, amongst other things, to "ensure" that associations registered under the FWRO Act are "representative of and accountable to their members, and are able to operate effectively".¹³ The legislative expression and explanation of intention is accompanied by a further statement to the relevant effect that "Parliament recognises and respects the role of employer and employee organisations in facilitating the operation of the workplace relations system".¹⁴

7 Section 323A(1) of the FWRO Act.

8 Section 323A(1)(a) of the FWRO Act.

9 Section 323C of the FWRO Act.

10 Section 323A(1)(b) of the FWRO Act.

11 Section 323B(1) of the FWRO Act.

12 Section 5(1) and (2) of the FWRO Act.

13 Section 5(3)(a) of the FWRO Act.

14 Section 5(5) of the FWRO Act.

3.

6 The Scheme itself was required to and did provide, amongst other things, for: the identity of the Administrator;¹⁵ the removal of identified officers¹⁶ and the termination of employment of identified employees¹⁷ of the Construction and General Division; the declaration of identified offices to be vacant¹⁸ and the timing of elections to those offices;¹⁹ the taking of disciplinary actions by the Administrator;²⁰ and the making by the Administrator of an alteration to the rules of the Division in circumstances where the alteration could not otherwise be made because of the administration.²¹

7 Having so commenced on 23 August 2024, the administration of the Construction and General Division of the CFMEU and its branches is to continue under Pt 2A of Ch 11 of the FWRO Act for a period of five years,²² unless the Scheme is earlier revoked by the Attorney-General or other responsible Minister.²³ Mirroring the condition of the initial exercise of power by the Attorney-General to determine the Scheme, the responsible Minister is empowered to revoke the Scheme if "satisfied that, having regard to the Parliament's intention in enacting [the FWRO Act], the revocation is in the public interest".²⁴ However, the Minister is precluded from exercising that power of revocation during an initial period of three years unless the Administrator gives the Minister written notification that the Administrator is satisfied that the Construction and General Division and each branch is functioning lawfully and effectively.²⁵

15 Section 323B(3)(a) of the FWRO Act and cl 2(1) of Annexure A of the Scheme.

16 Section 323B(3)(b) of the FWRO Act and cl 3(1)(a) and (b) of Annexure A of the Scheme.

17 Section 323B(3)(f) of the FWRO Act and cl 3(1)(b) of Annexure A of the Scheme.

18 Section 323B(3)(c) of the FWRO Act and cl 3(1)(a) of Annexure A of the Scheme.

19 Section 323B(3)(d) of the FWRO Act and cl 14 of Annexure A of the Scheme.

20 Section 323B(3)(e) of the FWRO Act and cl 12 of Annexure A of the Scheme.

21 Section 323B(3)(g) of the FWRO Act and cl 4(2) of Annexure A of the Scheme.

22 Section 323E of the FWRO Act.

23 Section 323D of the FWRO Act.

24 Section 323D(1A) of the FWRO Act.

25 Section 323D(2A) of the FWRO Act.

8 During the administration of the Construction and General Division of the CFMEU and its branches under Pt 2A of Ch 11 of the FWRO Act, which is accordingly ongoing, the Administrator has and will continue to have powers of control, management and disposition of property of the CFMEU previously used solely or predominantly for the purposes of the Construction and General Division or any of its branches.²⁶ In addition, the Administrator has and will continue to have the ability to perform any function and exercise any power that the Division or its branches (or any officers of the Division or its branches) could perform or exercise if it were not under administration.²⁷

9 In exercising those powers and performing those functions, the Administrator is and will continue to be obliged to be "satisfied" that he is "acting in the best interests of the members of the Construction and General Division and its branches".²⁸ And, though the Administrator is not constrained to act in accordance with any rules of the CFMEU or of the Division or its branches,²⁹ the Administrator is and will continue to be obliged to "have regard to" the objects of the CFMEU as defined by the rules of the CFMEU as at 23 August 2024 in so far as they are lawful.³⁰

10 The registered rules of the CFMEU as at 23 August 2024 defined the objects of the CFMEU as including: "[t]o uphold the right of combination of labour, and to improve, protect, and foster the best interests of the [CFMEU] and its members, and to assist them to obtain their rights under industrial and social legislation"; "[t]o do all things conducive to the welfare and organisation of the working class"; "[t]o take part in any or all questions of matters affecting or involving the wages and conditions of labour"; and "[t]o raise political levies, donate to and/or affiliate with political parties".³¹

11 Having regard to the long history of "the trade unions of Australia ... openly pursuing their objective of better working and living conditions not merely by industrial action but by the most active participation in politics",³² there could be no doubt that those objects are lawful. And having regard to those lawful objects,

26 Section 323K(1)(a), (b) and (c) and (6) of the FWRO Act.

27 Section 323K(1)(d) of the FWRO Act.

28 Section 323K(5)(a) of the FWRO Act.

29 Section 323G(1)(c) of the FWRO Act.

30 Section 323K(5)(b) of the FWRO Act.

31 *Rules of the Construction, Forestry and Maritime Employees Union*, r 4.

32 *William v Hursey* (1959) 103 CLR 30 at 59.

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there could be no cavilling with the description of the CFMEU as a registered employee organisation authorised by its rules "to raise and expend moneys for political purposes".³³

12 Historically, and until quite recently, the CFMEU had been affiliated with and had paid affiliation fees to the Australian Labor Party ("the ALP") and branches of the Construction and General Division had been affiliated with and had paid affiliation fees or had made donations to State and Territory branches of the ALP. Branches of the Construction and General Division have also been involved over many years in promoting a range of political causes including by organising rallies, lobbying members of Commonwealth and State Parliaments and Territory legislatures and engaging with the public.

13 By a proceeding commenced in the original jurisdiction of the High Court on 3 September 2024, the plaintiffs (who had been the Divisional Branch Secretary and Divisional Branch Assistant Secretary of the Construction and General Queensland-Northern Territory Divisional Branch of the CFMEU until removed from those offices on 23 August 2024 as a result of the Scheme) sought declaratory and injunctive relief against the Commonwealth and the Attorney-General ("the Commonwealth parties") as well as the Administrator on grounds which included the asserted constitutional invalidity of Pt 2A of Ch 11 of the FWRO Act and of the Scheme. The grounds of asserted invalidity came to be reflected in questions of law which the parties agreed in stating for the opinion of the Full Court by a special case filed in the proceeding on 18 October 2024. The special case was argued before the Full Court on 10 and 11 December 2024 when the Attorneys-General of South Australia, Tasmania and Queensland intervened pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the defendants.

14 The questions stated in the special case are set out in the reasons for judgment of Gordon J. I agree with the answers to those questions proposed by her Honour, the overall effect of which is that Pt 2A of Ch 11 of the FWRO Act and the Scheme are not invalid on any of the asserted grounds of constitutional invalidity.

15 As to the reasons for those answers, I agree with the reasons expressed by Jagot J for the answer to the effect that Pt 2A of Ch 11 of the FWRO Act does not infringe Ch III of the Constitution and also with the reasons expressed by Gordon J for the answer to the effect that Pt 2A of Ch 11 of the FWRO Act does not authorise an acquisition of property otherwise than on just terms within the meaning of s 51(xxxi) of the Constitution.

16 My preference is to state my own reasons for the answers to the effect that Pt 2A is properly characterised as a law with respect to constitutional corporations

33 *William v Hursey* (1959) 103 CLR 30 at 60.

within the meaning of s 51(xx) of the Constitution and to the effect that neither Pt 2A nor the Scheme impermissibly burdens the implied freedom of political communication.

Characterisation

17 The plaintiffs did not contest the propositions stated by the majority in *New South Wales v The Commonwealth (Work Choices Case)*³⁴ in the context of upholding the validity of the predecessor to the FWRO Act³⁵ that the power conferred on the Parliament by s 51(xx) of the Constitution to make laws with respect to constitutional corporations extends to prescribing "the means by which [constitutional corporations and their employees] are to conduct their industrial relations", including by providing for the registration of employer and employee organisations and by requiring "as a condition of registration, that these organisations meet requirements of efficient and democratic conduct of their affairs".

18 The plaintiffs accordingly embraced the validity of s 323 of the FWRO Act, pursuant to which the Federal Court of Australia is empowered on application to make a declaration that a branch of a registered organisation "has ceased to exist or function effectively and there are no effective means under the rules of the organisation or branch by which it can be reconstituted or enabled to function effectively"³⁶ and then to make an order approving a scheme for the taking of action "for the reconstitution of the branch" or "to enable the branch ... to function effectively".³⁷

19 The plaintiffs contrasted the objectivity and generality of the criterion of a branch having "ceased to ... function effectively" for the triggering of a scheme under s 323 of the FWRO Act with the criterion of satisfaction that it is in the "public interest" that the Construction and General Division of the CFMEU and its branches alone be placed under administration by reference to which the responsible Minister is empowered to determine a scheme of administration resulting in the triggering of the administration of the Construction and General Division of the CFMEU and each of its branches under Pt 2A of Ch 11 of the FWRO Act. Emphasising that the "public interest" imports "a discretionary value

34 (2006) 229 CLR 1 at 121-122 [198], 153 [322].

35 Schedule 1 to the *Workplace Relations Act 1996* (Cth) ("Registration and Accountability of Organisations").

36 Section 323(1)(a) of the FWRO Act.

37 Section 323(2)(a) and (b) of the FWRO Act.

judgment to be made by reference to undefined factual matters",³⁸ the plaintiffs argued that statutory criterion to be so indeterminate in this context that the connection between Pt 2A and the efficient and democratic functioning of the Division is incapable of being regarded as more than "insubstantial, tenuous or distant".³⁹

20 The problem with that argument is that it was too narrowly focussed on the potential for the extreme operation of one element of one provision which forms one part of a suite of provisions within Pt 2A of Ch 11 of the FWRO Act. Those provisions together comprise a single legislative plan governing the entirety of the commencement, conduct and conclusion of the administration of the Construction and General Division of the CFMEU and its branches. The legislative invocation of the "public interest" in that context is not at large but is informed by the totality of that context and is tethered to the Parliament's intention in enacting the FWROA Act to insert Pt 2A of Ch 11 into the FWRO Act. Important to recognise is that the original and continuing legislative expression of the Parliament's intention in enacting the FWRO Act applies, as a matter of construction,⁴⁰ to Pt 2A of Ch 11 of the FWRO Act as inserted by the FWROA Act. It is the desired end, or purpose, of the provisions of Pt 2A considered as a whole that "give[s] the key"⁴¹ to their characterisation as laws with respect to constitutional corporations within the meaning of s 51(xx) of the Constitution in the sense that "by divining [their] purpose ... from [their] effect and operation, [their] connexion with the subject of the power may appear more clearly".⁴²

21 Considered as a whole, in light of Parliament's original and continuing intention in enacting the FWRO Act as amended by the FWROA Act against the background of reported problems within the Division referred to in the Revised

38 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at 400-401 [42].

39 *cf Spence v Queensland* (2019) 268 CLR 355 at 405 [57], quoting *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79.

40 See *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 463, 479; *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 274 CLR 565 at 594 [86].

41 *Spence v Queensland* (2019) 268 CLR 355 at 406 [60], quoting *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 354.

42 *Spence v Queensland* (2019) 268 CLR 355 at 406 [61], quoting *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 319.

Explanatory Memorandum,⁴³ it can be said of Pt 2A of Ch 11 of the FWRO Act, as it was said of the provisions which imposed complex and extensive conditions on the holding of broadcasting licences considered in *Herald and Weekly Times Ltd v The Commonwealth*,⁴⁴ that it is "impossible ... to avoid the conclusion, even upon consideration of the most extreme illustrations of the working of the provisions, that together they form a means, and are enacted as a means, for effectuating a desired end which is within power".

- 22 Framed as they are to achieve the specific legislative purpose identified in the Revised Explanatory Memorandum for the FWROA Act as being "to end ongoing dysfunction within the Division and to ensure it is able to operate effectively in the interests of its members",⁴⁵ which the Commonwealth parties emphasised in argument is supportive of the Parliament's original and ongoing general intention of "facilitating the operation of the workplace relations system", the connection of the provisions of Pt 2A of Ch 11 of the FWRO Act with efficient and democratic conduct of the affairs of the Division is apparent. That connection is sufficient to support their characterisation as laws with respect to constitutional corporations within the meaning of s 51(xx) of the Constitution.

Implied freedom of political communication

- 23 No party or intervener sought leave to reopen the unanimous decision in *Lange v Australian Broadcasting Corporation*⁴⁶ which confirmed the implied freedom of political communication recognised in *Nationwide News Pty Ltd v Wills*⁴⁷ and *Australian Capital Television Pty Ltd v The Commonwealth*.⁴⁸ None sought leave to reopen any of the thirty decisions in which this Court has elaborated and applied the implied freedom of political communication in the nearly thirty years since *Lange*.

43 Australia, House of Representatives, *Fair Work (Registered Organisations) Amendment (Administration) Bill 2024*, Revised Explanatory Memorandum at 2-4 [7]-[10].

44 (1966) 115 CLR 418 at 437.

45 Australia, House of Representatives, *Fair Work (Registered Organisations) Amendment (Administration) Bill 2024*, Revised Explanatory Memorandum at 4 [11].

46 (1997) 189 CLR 520.

47 (1992) 177 CLR 1.

48 (1992) 177 CLR 106.

24 Any application to reopen *Lange* or any of its progeny, were it to be made, would be determined by the Court as a whole with the benefit of argument, taking account of the full range of considerations which have repeatedly been acknowledged to inform the application of the "strongly conservative cautionary principle, adopted in the interests of continuity and consistency in the law, that such a course should not lightly be taken".⁴⁹

25 Unless and until such an application is made, and if made is determined in favour of reopening and overruling, the duty of each member of this Court as constituted from time to time is to apply *Lange* and the decisions which have elaborated upon it, "not to be convinced by it".⁵⁰ Respect for and fidelity to the past decisions of this Court must start with the individuals who are the current members of this Court. Observance of that individual constraint is an institutional imperative.

26 Why observance of the constraint is an institutional imperative was explained by Brennan J in *Baker v Campbell*⁵¹ and in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*.⁵² The foundational conception is that the function of declaring the law is vested in the Court rather than in the Justices who from time to time comprise the Court. Building on that foundation, the discipline that "a decision of the Court will be followed in subsequent cases by the Court, however composed, subject to the exceptional power which resides in the Court to permit reconsideration", combined with the institutional constraint on the exercise of that exceptional power of the Court to reopen and re-examine its own decisions, "provides the appropriate balance between a legal system on which the dead hand of the past rests too heavily and one in which the law is in continual ferment".

27 Whether an impugned law infringes the implied freedom of political communication turns on the result of an orthodox and familiar inquiry established by the Court in *Lange* and refined by the Court differently comprised in subsequent cases, the most significant of them being *Coleman v Power*⁵³ and *McCloy v New*

49 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1011 [17]; 415 ALR 254 at 259, quoting *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 352 [70].

50 *Hofer v The Queen* (2021) 274 CLR 351 at 381 [96], quoting *Vickers Cockatoo Dockyard Pty Ltd v El Ali* (unreported, Court of Appeal of the Supreme Court of New South Wales, 17 December 1987).

51 (1983) 153 CLR 52 at 103.

52 (1988) 165 CLR 107 at 130.

53 (2004) 220 CLR 1.

South Wales.⁵⁴ The inquiry is as to: whether the law effectively burdens freedom of political communication in its legal or practical operation; if so, whether its purpose is legitimate in the sense of being compatible with the maintenance of the constitutionally prescribed system of representative government; and, if so, whether it is reasonably appropriate and adapted to advance that purpose in a manner that is compatible with maintenance of the constitutionally prescribed system of representative government.

28 Neither the breadth of the concepts employed, nor the lack of unanimity amongst members of the Court in and after *McCloy* as to whether and when the third stage is or might usefully be informed by subsidiary concepts of "suitability", "necessity" and "adequacy of balance", detracts from the orthodoxy of that inquiry or relieves the judicial duty to undertake so much of it as is required to determine legal rights in issue in a particular case.

29 Unresolved differences as to how the third stage of the inquiry is best undertaken cannot undermine the common ground upon which those differences have emerged – that the inquiry must be undertaken. Notably, as recently remarked on in *Babet v The Commonwealth*,⁵⁵ the emergence of those differences was anticipated in *Lange*.⁵⁶ The Court there noted that "[d]ifferent formulae [had] been used by members of this Court in other cases to express the test whether the freedom provided by the Constitution has been infringed" in that "[s]ome judges [had] expressed the test as whether the law is reasonably appropriate and adapted to the fulfilment of a legitimate purpose" and that "[o]thers [had] favoured different expressions, including proportionality". Importantly, the Court recorded that, in the context of the issues in that case, prime amongst which was whether the existence of the implied freedom should continue to be recognised, "there [was] no need to distinguish these concepts".

30 Turning now to undertake the inquiry in the present case, contrary to an argument of the Commonwealth parties, the inquiry cannot be diverted from a consideration of Pt 2A of Ch 11 of the FWRO Act to a consideration only of the constitutionally permissible scope of the Scheme.⁵⁷ That is essentially for the reason given by Beech-Jones J.⁵⁸ The reason is in part that the basic features of the Scheme are statutorily mandated and in part that the critical powers, functions and

54 (2015) 257 CLR 178.

55 [2025] HCA 21 at [49].

56 (1997) 189 CLR 520 at 562.

57 cf *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 613-614; *Palmer v Western Australia* (2021) 272 CLR 505 at 547 [122], [124], 581-582 [227].

58 See at [430]-[433].

obligations of the Administrator are conferred and imposed by the provisions of Pt 2A and operate not under the Scheme but by reference merely to the existence of the Scheme.

Burden

31 The first stage of the inquiry, into whether a law effectively burdens freedom of political communication, recognises as beyond the scope of constitutional protection laws the effect of which on political communication is "insubstantial or adventitious".⁵⁹ The inquiry is into "the character of the law assessed and expressed by reference to its tendency" to burden political communication and is "qualitative not quantitative".⁶⁰

32 To describe a law as one that "effectively burdens" freedom of political communication in its legal or practical operation has been said time and again to mean "nothing more complicated than that the effect of the law is to prohibit, or put some limitation on, the making or the content of political communications".⁶¹ The effect of a law on the making or content of political communications is correspondingly gauged by "nothing more complicated than comparing: the practical ability of a person or persons to engage in political communication with the law; and the practical ability of that same person or those same persons to engage in political communication without the law".⁶² The relevant burden is to be found in the "incremental effect ... on the real-world ability of a person or persons to make or to receive" political communications.⁶³

33 To confine constitutional protection to a law which operates to impose a burden on political communication assessed according to some quantitative or volumetric measure "would be inimical to the nature of the freedom to be

59 *Tajjour v New South Wales* (2014) 254 CLR 508 at 579 [146].

60 *Tajjour v New South Wales* (2014) 254 CLR 508 at 578 [145].

61 *Monis v The Queen* (2013) 249 CLR 92 at 142 [108]. See also *Unions NSW v New South Wales* (2013) 252 CLR 530 at 574 [119]; *McCloy v New South Wales* (2015) 257 CLR 178 at 230-231 [126]; *Brown v Tasmania* (2017) 261 CLR 328 at 382-383 [180], 455 [395]; *Comcare v Banerji* (2019) 267 CLR 373 at 398 [29]; *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 53-54 [136]; *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at 587-588 [154].

62 *Brown v Tasmania* (2017) 261 CLR 328 at 383 [181].

63 *Brown v Tasmania* (2017) 261 CLR 328 at 386 [188].

protected, which exists to ensure that even the smallest minority is not, without justification, denied by law an ability to be heard in the political process".⁶⁴

34 To confine constitutional protection to a law which operates to impose a net burden on political communication after corresponding enhancements to political communication have been taken into account would also be inimical to the nature of the freedom to be protected. To do so would blur the critical distinction between the existence or non-existence of a burden, on the one hand, and the existence of justification for any such burden, on the other hand. The subject of the first stage of the inquiry is the former. The subject of the subsequent stages of the inquiry, in respect of which the persuasive onus is cast on the party or parties seeking to uphold the validity of the law,⁶⁵ is the latter. The blurring of the distinction would involve treating a justifiable but unjustified burden as no burden at all.

35 That point was made strongly in *Unions NSW v New South Wales*⁶⁶ in rejecting an argument that "the availability of public funding and the existence of expenditure caps" under the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) meant that its prohibition on acceptance of political donations imposed "no material burden" on the freedom. Those enhancements to political communication were said to be "beside the point". "Questions as to the extent of the burden and whether it is proportionate to the legitimate purpose of a statutory provision" were explained to "arise later" in the requisite inquiry, "[t]he question at this point [being] simply whether the freedom is in fact burdened".

36 The circumstance that the restrictions on the time, place or method of engaging in political communications in each of *Australian Capital Television Pty Ltd v The Commonwealth*,⁶⁷ *Levy v Victoria*,⁶⁸ *Monis v The Queen*,⁶⁹ *Brown v Tasmania*⁷⁰ and *Clubb v Edwards*⁷¹ were found to impose burdens which required

64 *Tajjour v New South Wales* (2014) 254 CLR 508 at 578 [145].

65 *McCloy v New South Wales* (2015) 257 CLR 178 at 201 [24]; *Unions NSW v New South Wales* (2019) 264 CLR 595 at 618 [53], 631-632 [93]-[95], 650 [151]; *Unions NSW v New South Wales* (2022) 277 CLR 627 at 644 [31].

66 (2013) 252 CLR 530 at 555 [40].

67 (1992) 177 CLR 106.

68 (1997) 189 CLR 579.

69 (2013) 249 CLR 92.

70 (2017) 261 CLR 328.

71 (2019) 267 CLR 171.

justification in order to be shown to be compatible with the implied freedom illustrates the observations made by Nettle J in *Brown v Tasmania*⁷² that "it does not follow that, just because restrictions on a particular form of political communication leave those who are affected free to pursue other forms of political communication, the restrictions will not impose a burden on the implied freedom of political communication" and that "if a restriction on a preferred mode of communication significantly compromises the ability of those affected to communicate their message, it may not be an answer that they are left free to communicate by other, less effective means". Those observations are pertinent here.

37 The effective burden which Pt 2A of Ch 11 of the FWRO Act imposes on freedom of political communication is a meaningful practical limitation on political communication which arises from the combination of two main features of its legal operation. One is its automatic removal of officers of the Construction and General Division and conferral of the functions and powers that those officers would have in the absence of administration, as well as the functions and powers of the Construction and General Division and its branches, on the Administrator. The other is its automatic vesting in the Administrator of powers of control, management and disposition of property of the CFMEU previously used solely or predominantly for the purposes of the Construction and General Division or any of its branches.

38 The resultant practical limitation on political communication has at least three dimensions. The first is the deprivation of the capacity of the CFMEU, as a body corporate, to deploy its own property for the purposes of political communication in pursuit of its political objects in accordance with the rules of the Construction and General Division. The second is the impediment of the capacity of members of the Construction and General Division to engage in collective political communication, and to pool and deploy property for the purpose of political communication, through the vehicle of the Construction and General Division and in accordance with its rules. The third is the restricted capacity for donations to political parties attributable to the requirement for the Administrator now to be satisfied that such a donation would be in the best interests of members in order for the donation to be made.

39 The significance of each of those dimensions of the resultant practical limitation on political communication lies in its effect on "the freedom generally",⁷³ that is to say, on "the free flow of political communication within the

72 (2017) 261 CLR 328 at 407 [258].

73 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 553 [35].

federation",⁷⁴ bearing in mind that the freedom protected is not merely to disseminate but also to receive information which might ultimately bear on electoral choice.⁷⁵ In respect of the second dimension, that effect stems from a curtailment of the effectiveness of individuals being able to associate for political purposes which has been recognised as "part and parcel of the protected freedom"⁷⁶ as Beech-Jones J emphasises.⁷⁷ In respect of the third, that effect stems from the restriction on a source of funds historically available to political parties to meet the cost of political communication.⁷⁸

40 Tellingly, the Commonwealth parties did not deny the existence of a burden. The thrust of their argument was that any burden was both "slight and incidental to the pursuit of a purpose unrelated to restricting political communication" and was therefore "readily justified".

Purpose

41 The "purpose" of a law in this and other constitutional contexts, as I have explained in the past, equates to the "end" or "object" of the law.⁷⁹ The purpose is the "public interest sought to be protected and enhanced" by the law.⁸⁰ Most often, as here, the purpose can be described in terms of what "the law is designed to achieve in fact",⁸¹ which is the inverse of "the mischief" at which the law is aimed.⁸²

74 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 574 [119].

75 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561.

76 *Tajjour v New South Wales* (2014) 254 CLR 508 at 578 [143]. See *Unions NSW v New South Wales* (2013) 252 CLR 530 at 551 [29].

77 See at [435].

78 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 555 [41], 574 [120]-[121].

79 See *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 377-378 [101]-[102] and the cases there cited.

80 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 300.

81 See *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1015 [40]; 415 ALR 254 at 264-265.

82 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 394 [178].

42 Three features of that generic constitutional conception of the purpose of a law need to be highlighted.

43 The first is the most fundamental. The judicial ascertainment and attribution of the purpose to a law, no less than the judicial ascertainment and attribution of a meaning to the same law, is "an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws".⁸³ Each "is an exercise in attributing an objective intention to the outcome of a legislative process".⁸⁴ Purpose, like meaning, is to be "ascertained objectively" from the "whole text and context".⁸⁵ The difference is that, because ascertainment of the purpose of a law is not directed to the meaning of the enacted text but to why that text was enacted, ascertainment of the purpose of a law can be informed by the enacted text but can never be confined to or by the enacted text.⁸⁶

44 The second is that a law can have more than one purpose and that an ascertained and attributed purpose of a given law can often be expressed at more than one level of generality or specificity. The level appropriate for judicial expression of a particular purpose in a particular case will "depend on what constitutional analysis is being undertaken", which will in turn "depend on what constitutional doctrine is in play and ultimately on what constitutional value is at stake".⁸⁷

45 The third is that the context within which the purpose of a law is to be ascertained can be no narrower than the context within which the meaning of that same law falls to be ascertained. That context includes the entirety of the parliamentary proceedings which resulted in the enactment of the law. For the most part, that process will have been a matter of contemporaneous public record. But there is no reason in principle to exclude part of those proceedings merely because it was not. Just as legal advice communicated in confidence by the Government to the Opposition during the parliamentary process might shed light on the meaning

83 *Zheng v Cai* (2009) 239 CLR 446 at 455 [28].

84 *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 382 [114].

85 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 12 [16]; 419 ALR 457 at 468. See also *Brown v Tasmania* (2017) 261 CLR 328 at 391-392 [208]-[209].

86 See *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 382 [114]-[117] and the cases there cited.

87 *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 378 [104]. See also *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 12 [16]; 419 ALR 457 at 468.

of enacted text,⁸⁸ so too other communications during the parliamentary proceedings might shed light on what was sought to be achieved by its enactment.

46 The Commonwealth parties argued that, expressed at the level appropriate to an examination of the permissibility of its burden on freedom of political communication, the purpose to be ascertained and attributed to Pt 2A of Ch 11 of the FWRO Act should be confined to that identified in the Revised Explanatory Memorandum for the FWROA Act: "to end ongoing dysfunction within the [Construction and General Division of the CFMEU] and to ensure it is able to operate effectively in the interests of its members". That specific purpose, they argued, must be understood as an aspect of the more general purpose exposed by the legislative statement of the Parliament's intention in enacting the FWRO Act of "facilitating the operation of the workplace relations system".

47 The plaintiffs did not contest that purpose. Nor did they suggest that it was not legitimate. Nor, as their argument developed in oral submissions, did they contest that Pt 2A of Ch 11 of the FWRO Act was capable of justification by reference to that purpose. Plainly, it is.

48 When Pt 2A of Ch 11 of the FWRO Act is assessed by reference to the purpose of ending ongoing dysfunction within the Construction and General Division of the CFMEU and to ensuring it is able to operate effectively in the interests of its members, there can be no doubt that the form of administration of the Division for which it provides is reasonably appropriate and adapted to advance that purpose in a manner that is compatible with maintenance of the constitutionally prescribed system of representative government. The burden Pt 2A imposes on freedom of political communication in all of its dimensions is justified as an incident of the control of the Administrator over the property and affairs of the Construction and General Division of the CFMEU. Control of that nature is an ordinary characteristic of any form of administration of a corporation or part of a corporation.

49 The concentration of the plaintiffs' argument was instead on an additional, more specific, and constitutionally impermissible, purpose which they argued to be ascertainable by reference to the proceedings in the Senate which resulted in its passage of the Bill for the FWROA Act. The plaintiffs crystallised that purpose as being "the suppression of political donations and activity" by the Construction and General Division of the CFMEU.

50 The Bill for the FWROA Act was introduced into the Senate and read for a second time on 12 August 2024 by Senator Watt, the Minister for Employment and Workplace Relations. It was debated extensively in the Senate between 13 and 19 August 2024 before being passed in an amended form by the Senate with the

88 cf *Wong v The Commonwealth* (2009) 236 CLR 573 at 625 [182]-[185].

support of the Opposition on 19 August 2024. The Bill was then introduced into, read for a second time and debated in, and passed by the House of Representatives on 20 August 2024 before receiving the assent of the Governor-General on 22 August 2024.

51 The focus of the plaintiffs' argument was on two things said during the period of the debate in the Senate which linked to correspondence not tabled in the Senate or otherwise published at the time. The first in time was a statement by Senator Watt during the debate which occurred in the Senate on 15 August 2024. The statement was made in an exchange with Senator Cash, the Deputy Leader of the Opposition in the Senate. As recorded in Hansard, Senator Watt then said:⁸⁹

"We've already agreed to Senator Cash that the scheme of administration that would be applied under this legislation would ban donations to any political party for the period of the administration. We've already agreed to that. It's in a letter to Senator Cash saying it will be in the scheme of administration, which is part of the legislation."

52 The letter to which Senator Watt was then referring was a letter dated 14 August 2024 addressed from him, as Minister for Employment and Workplace Relations, to Senator Cash, as Deputy Leader of the Opposition in the Senate. The letter read in relevant part:

"Subject to passage of the Bill, the Government commits to considering whether it is in the public interest to make a scheme of administration that includes the following features:

- Limitations on donations to political parties (subject to seeking legal advice from my department)
- A power for the administrator to appoint a special purpose auditor
- A requirement that the administrator must be satisfied that any branch is operating lawfully and effectively before requesting that the Minister vary the scheme to end the administration for a branch."

53 The other was a public statement by Senator Cash on 19 August 2024 in which she was quoted as having said "I have been provided with a copy of a letter from the administrator to the Minister, [Senator] Watt, which clearly sets out the administrator's goals, and one of those very clear goals is to ensure that the CFMEU, in administration is not to incur any form of political campaign expenditure or make party political donations and I am prepared to accept that".

89 Australia, Senate, *Parliamentary Debates* (Hansard), 15 August 2024 at 3093.

54 The letter to which Senator Cash was then referring was a letter from the Administrator to Senator Watt dated 19 August 2024 affirming that the Administrator "intend[ed] to conduct a lawful Administration" and setting out certain "principles" and "goals" that he had determined would guide him should he decide to accept the appointment. One of the "[g]uiding principles" set out in the letter was stated in terms that "[t]he union will not engage in party politics during the administration: donations; positions at political party conferences; promotion of particular candidates". The letter concluded: "Further, I can advise you that I intend, should I be appointed as Administrator, to vary the rules of the Construction and General Division of the CFMEU to prohibit the making of party-political donations or the funding of party-political campaigns."

55 In the unfolding of subsequent events, the Scheme as determined by the Attorney-General on 23 August 2024 did not make provision for any limitations on donations to political parties. The Divisional Branch Assistant Secretary and acting Divisional Branch Secretary of the Construction and General Division of the Australian Capital Territory Divisional Branch of the CFMEU submitted in writing, pursuant to a grant of leave to intervene, that he and the Divisional Branch had been given "interim directions" on 28 August 2024 by the Administrator not to engage in party politics and to cease party-political donations. However, the proceeding commenced on 3 September 2024 involved no allegation that the Administrator had then taken any action in relation to the engagement of the Construction and General Division of the CFMEU in party politics or in relation to the variation of the rules of the Division and the special case filed on 18 October 2024 raised no question as to the validity of any specific action on the part of the Administrator.

56 For the purposes of answering the constitutional question stated in the special case, it is sufficient to note that apart from any other applicable constraint, the Administrator could not take any action in relation to the engagement of the Construction and General Division of the CFMEU in party politics or in relation to the variation of the rules of the Division unless "satisfied" at the time that the action is "in the best interests of the members of the Construction and General Division and its branches" having regard to the objects of the CFMEU as defined by the rules of the CFMEU as at 23 August 2024 including the political objects. Implicit in the statutory requirement that the Administrator be so satisfied at the time of the action is a requirement not only that the Administrator believe that the action is in the best interests of the members of the Construction and General Division and its branches having regard to those political objects but that the Administrator form that belief according to law and to reason within limits set by the subject-matter, scope and purposes of the FWRO Act.⁹⁰ The implicit statutory

90 *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432; *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 150 [34].

requirement that the belief be formed according to law has a constitutional significance to which I will return.

57 The point now to be made is that, regardless of how subsequent events unfolded or might yet unfold, what was said by Senator Watt in the Senate on 15 August 2024 (by reference to his letter to Senator Cash on 14 August 2024) and what was said by Senator Cash on 19 August 2024 (by reference to the Administrator's letter to Senator Watt on the same day) are, in my opinion, sufficient basis from which to infer a qualified form of the additional legislative purpose for which the plaintiffs argued, being the suppression of political donations and activity by the Construction and General Division of the CFMEU. In my opinion, what was said and written by Senator Watt and what was said by Senator Cash cannot be treated as showing nothing more than "the motives or intentions of the Minister or individual members of the legislature"⁹¹ in participating in the enactment of the FWROA Act. The statements show what both the Government, represented by Senator Watt, and the Opposition, represented by Senator Cash, wanted to achieve in fact by its enactment, if they could. The qualification is important and is something to which I will also return.

58 Were the additional purpose properly identified in unqualified terms as the suppression of political donations and activity by the Construction and General Division of the CFMEU, it would not be a purpose compatible with the constitutionally prescribed system of representative government. Suppressing political communication by the whole or some part of an employee organisation "may be a means to a legitimate end, but it cannot be a legitimate end in itself".⁹²

59 Especially in light of the continuing expression of the intention of the Parliament in the FWRO Act as amended by the FWROA Act to include Pt 2A of Ch 11 of the FWRO Act, "an additional object that is not only unexpressed but also constitutionally impermissible should not lightly be inferred".⁹³ That is why the qualification is important.

60 Though the Government, through Senator Watt, committed to consider the determination of a scheme which would include limiting the ability of the Construction and General Division of the CFMEU to make donations to political parties, that commitment was expressly made subject to seeking legal advice. And though the Opposition, through Senator Cash, was prepared to proceed on an acceptance of the indication of the Administrator that he would seek to exercise

91 *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at 254 [83], quoting *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 561 [12].

92 *Brown v Tasmania* (2017) 261 CLR 328 at 392 [210].

93 *Unions NSW v New South Wales* (2019) 264 CLR 595 at 627 [79].

his powers and perform his functions to ensure that the Division would not incur political campaign expenditure or make party political donations whilst in administration, it is pellucid that the indication of the Administrator was in the context of an overarching commitment and legal obligation to exercise his powers and perform his functions lawfully.

61 Nothing in the statements of Senator Watt or Senator Cash can therefore be taken to support the inference that the power to determine a scheme of administration which was to be conferred on the Minister, or the powers and functions which were to be conferred on the Administrator, by provisions of Pt 2A of Ch 11 of the FWRO Act, were to be able to be used for the purpose of suppressing political donations and activity by the Construction and General Division of the CFMEU if that purpose was not constitutionally permissible. That is to say, the constitutionally impermissible purpose of suppressing political donations and activity by the Construction and General Division of the CFMEU to be ascertained and attributed to the Parliament is a purpose the existence of which was and remains contingent on that purpose being constitutionally permissible.

62 Here, the standing expression of the intention of Parliament in s 15A of the *Acts Interpretation Act 1901* (Cth) ("the Interpretation Act") comes into play and must be given effect. The section declares that "[e]very Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power". That is a "general declaration of the contingent intention of the [Parliament] that if a law in the form enacted would operate to transgress a constitutional limitation on legislative power then the law is still to operate to the extent constitutionally permitted".⁹⁴

63 A standard application of the contingent intention so declared by s 15A of the Interpretation Act is "to read down a provision expressed in general words so as to have no application within an area in which legislative power is subject to a clear constitutional limitation",⁹⁵ the implied freedom of political communication being an example of such a constitutional limitation. An orthodox instance of this standard application is to read down a statutory conferral of a power or function expressed in general terms to prohibit its exercise for a constitutionally

94 *Clubb v Edwards* (2019) 267 CLR 171 at 218 [140].

95 *Tajjour v New South Wales* (2014) 254 CLR 508 at 586 [171].

impermissible purpose.⁹⁶ Through the operation of s 15A, the constitutionally impermissible purpose becomes a statutorily impermissible purpose.

64 The standing expression of the intention of Parliament in s 15A of the Interpretation Act therefore permits and requires the provisions of Pt 2A of Ch 11 of the FWRO Act conferring power on the Minister to determine a scheme of administration and conferring powers and functions on the Administrator in the ensuing administration to be read down to exclude the suppression of political donations and activity by the Construction and General Division of the CFMEU as a permissible purpose in the exercise or performance of those powers and functions. That is what must occur.

65 The intention declared by s 15A of the Interpretation Act yields through s 2(2) of the Interpretation Act to a "contrary intention". A contrary intention is an intention that the Act in question "was intended to operate fully and completely according to its terms, or not at all".⁹⁷ That is not this case. In enacting the FWROA Act, the Parliament would have empowered the Minister and the Administrator to suppress political donations and activity by the Construction and General Division of the CFMEU if it could have. But it cannot, and so it did not.

66 Construed subject to the Constitution in accordance with s 15A of the Interpretation Act, Pt 2A of Ch 11 of the FWRO Act therefore burdens the implied freedom of political communication, but not for an impermissible purpose and not in an impermissible manner.

Conclusion

67 The questions of law stated by the parties should be answered in the terms proposed by Gordon J.

96 *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 596-597, 614-615; *AMS v AIF* (1999) 199 CLR 160 at 176 [37]; *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 at 281-282 [90].

97 *Knight v Victoria* (2017) 261 CLR 306 at 325 [35], quoting *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 502, quoting *Pidoto v Victoria* (1943) 68 CLR 87 at 108.

68 GORDON J. This case concerns the validity of Pt 2A of Ch 11 of the *Fair Work (Registered Organisations) Act 2009* (Cth) ("the FWRO Act") and s 177A of the *Fair Work Act 2009* (Cth),⁹⁸ as well as the *Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024* ("the Determination") made under s 323B(1) in Pt 2A. The making of the Determination, and the appointment of Mark Irving KC as "the Administrator" under s 323C(1) of the FWRO Act, triggered s 323A(1) of the FWRO Act whereby the Construction and General Division ("the C&G Division") of the Construction, Forestry and Maritime Employees Union ("the CFMEU"), and its branches, were placed under administration (or what the legislation calls a "scheme for administration" ("the Scheme")). During the Scheme, the Administrator has control of the property and affairs of the C&G Division and the C&G Divisional branches.

69 The CFMEU is a trade union, representing some 120,000 workers across Australia. It is an organisation registered under the FWRO Act.⁹⁹ As a registered organisation, it is a body corporate, it has power to purchase, hold and deal with any real or personal property and it may sue and be sued in its registered name.¹⁰⁰ The CFMEU has three Divisions, one of which is the C&G Division. The C&G Division has six Divisional branches which correspond to one or more of the States and Territories. Neither the C&G Division, nor its Divisional branches, has a separate legal personality. The Scheme removed the plaintiffs from office within the C&G Division. The special case records that the C&G Division and its branches have previously incurred expenditure in federal, State and Territory elections, including by making donations to political parties and candidates.

70 The plaintiffs contended that Pt 2A of Ch 11 of the FWRO Act and s 177A of the *Fair Work Act* are invalid on four bases: that they (1) are unsupported by a head of Commonwealth legislative power; (2) infringe the implied freedom of political communication "by reason of their illegitimate purpose or unjustified burden on political communication"; (3) infringe Ch III of the *Constitution*; and (4) effect an "acquisition of property" within the meaning of s 51(xxxi) of the *Constitution* otherwise than on just terms.

98 The *Fair Work (Registered Organisations) Amendment (Administration) Act 2024* (Cth) inserted Pt 2A into Ch 11 of the FWRO Act and s 177A into the *Fair Work Act*.

99 FWRO Act, s 6 definition of "organisation" and Pt 2 of Ch 2.

100 FWRO Act, s 27(a), (c), (e).

71 The parties agreed a special case and stated questions of law for the opinion of the Full Court. The questions, and the answers to those questions, are to the following effect:

- (1) Are Pt 2A of Ch 11 of the FWRO Act, s 177A of the *Fair Work Act* and/or the *Fair Work (Registered Organisations) Amendment (Administration) Act 2024* (Cth) ("the Administration Act") invalid because they are not laws with respect to any head of power in ss 51 or 122 of the *Constitution*?

Answer: No.

- (2) Are Pt 2A of Ch 11 of the FWRO Act, s 177A of the *Fair Work Act* and/or the Administration Act invalid because they impermissibly burden the implied freedom of political communication?

Answer: No.

- (3) Is the Determination invalid because it is not authorised by Pt 2A of Ch 11 of the FWRO Act by reason of the implied freedom of political communication?

Answer: No.

- (4) Are Pt 2A of Ch 11 of the FWRO Act, s 177A of the *Fair Work Act* and/or the Administration Act invalid because they infringe Ch III of the *Constitution*?

Answer: No.

- (5) Are Pt 2A of Ch 11 of the FWRO Act, s 177A of the *Fair Work Act* and/or the Administration Act invalid because they are laws authorising the acquisition of property otherwise than on just terms within the meaning of s 51(xxxi) of the *Constitution*?

Answer: No.

- (6) Is s 323M of the FWRO Act invalid because it authorises the acquisition of property otherwise than on just terms within the meaning of s 51(xxxi) of the *Constitution*?

Answer: No.

- (7) Who should bear the costs of the special case (having regard, if appropriate, to s 329 of the FWRO Act)?

Answer: There should be no order as to costs.

Background

Part 2A of Ch 11 of the FWRO Act

72 The Administration Act inserted Pt 2A into Ch 11 of the FWRO Act.¹⁰¹ Part 2A, headed "Administration of the [C&G] Division of the CFMEU and its branches", comprises three divisions: Div 1, headed "Scheme for administration" (ss 323A to 323M); Div 2, headed "Persons removed from office etc. as a result of scheme for administration" (ss 323MA to 323ME); and Div 3, headed "Other matters relating to the administration" (ss 323N to 323T).

73 Section 323A(1) provides that, by force of that sub-section, the C&G Division and each of its branches "is placed under administration from the earliest time at which *both of the following* are in force" (emphasis added): a legislative instrument (in the form of a determination) made under s 323B(1)¹⁰² and the appointment of an administrator under s 323C.

74 Section 323B, headed "Scheme for the administration of the [C&G] Division and its branches", is important and relevantly provides:

"(1) The Minister may, in writing, determine a scheme for the administration of the [C&G] Division and its branches, if the Minister is satisfied that, having regard to the Parliament's intention in enacting this Act (see section 5), it is in the public interest for the Division and its branches to be placed under administration.

...

(3) Without limiting subsection (1), the scheme must provide for the following:

- (a) the person who is to be appointed as the administrator of the scheme under section 323C;
- (b) suspension or removal of officers;

101 The Administration Act also inserted s 177A into the *Fair Work Act*. That section, in substance, relevantly provides that a person who ceases to be an officer of the C&G Division or any of its branches as a result of the Scheme must not be, purport to be, or hold out that they are, a bargaining representative of an employee or employer.

102 An instrument made under s 323B(1) is a legislative instrument, but s 42 of the *Legislation Act 2003* (Cth) (which concerns the disallowance of legislative instruments) does not apply to the instrument: s 323B(2) of the FWRO Act.

25.

- (c) declarations that offices are vacant;
- (d) the timing of elections of officers;
- (e) the taking of disciplinary actions by the administrator, including expulsion of members and disqualification of officers for up to 5 years, and including in circumstances not provided for by the rules of the CFMEU or the [C&G] Division;
- (f) the termination of employment of employees of the [C&G] Division or its branches;
- (g) the making of an alteration of the rules of the [C&G] Division by the administrator in circumstances where, because of the administration, the alteration cannot be made in accordance with any provision made by this Act (other than this Part) or the rules;

...

Note: The scheme and things done under it have effect despite anything in this Act, Part 2-4 of the Fair Work Act or the rules of the CFMEU or any branch, division or part of it (see section 323F).

- (4A) The scheme may provide for any other matters the Minister considers appropriate.
- (4) The Minister is not required to observe any requirements of the natural justice hearing rule in making a decision under this section."

As soon as practicable after a scheme is determined under s 323B(1), the General Manager of the Fair Work Commission must, in writing, appoint a person to be the administrator of the scheme.¹⁰³ Under s 323D(1), the administrator can request the Minister to vary a scheme determined under s 323B(1) and, if the Minister is satisfied that, having regard to the Parliament's intention in enacting the FWRO Act,¹⁰⁴ the variation is in the public interest, the Minister must in writing vary the scheme as requested.

75 Sections 323A, 323B, 323C and 323D have a sunset clause; they cease to be in force on the fifth anniversary of the day the administration began under

103 FWRO Act, s 323C(1).

104 FWRO Act, s 5. See [79]-[81] below.

s 323A(1),¹⁰⁵ and will end sooner if the administrator requests the Minister to revoke the scheme and the Minister is satisfied, having regard to the Parliament's intention in enacting the FWRO Act, that it is in the public interest to revoke the scheme.¹⁰⁶ A scheme determined under s 323B(1), any action taken under the scheme, and an instrument of appointment of an administrator under s 323C, have effect despite anything in the FWRO Act, Pt 2-4 of the *Fair Work Act* or the rules of the CFMEU or a branch, division or part of the CFMEU.¹⁰⁷

76 While the C&G Division and its branches are under administration, the administrator has control of the property and affairs of the Division and its branches;¹⁰⁸ may manage that property and those affairs;¹⁰⁹ may dispose of any of that property;¹¹⁰ and may perform any function, and exercise any power, that the C&G Division or its branches, or any officers of the C&G Division or its branches, could perform or exercise if it were not under administration.¹¹¹ None of those provisions limit the generality of anything else in the sub-section.¹¹² References to the property of the C&G Division and its branches include references to property of the CFMEU that, immediately before Pt 2A commenced, was solely or predominantly used for the benefit or the purposes of the C&G Division or any of its branches.¹¹³

77 In performing functions and exercising powers as the administrator, the administrator must be satisfied they are acting in the best interests of the members of the C&G Division and its branches,¹¹⁴ and must have regard to

105 FWRO Act, s 323E.

106 FWRO Act, s 323D(1A)-(3).

107 FWRO Act, s 323F.

108 FWRO Act, s 323K(1)(a).

109 FWRO Act, s 323K(1)(b).

110 FWRO Act, s 323K(1)(c).

111 FWRO Act, s 323K(1)(d).

112 FWRO Act, s 323K(2).

113 FWRO Act, s 323K(6). There is a clear error in s 323K(6). Read literally, s 323K(6) refers to property of the CFMEU used for the benefit or purposes of the C&G Division "immediately before *this Act* commenced" (emphasis added), when it should refer to property used immediately before *Pt 2A* commenced.

114 FWRO Act, s 323K(5)(a).

the objects of the CFMEU as defined in the rules of the CFMEU at the start of the scheme, so far as they are lawful.¹¹⁵ The administrator also has the function of promoting compliance by the C&G Division with the laws (including workplace laws) of the Commonwealth, the States and the Territories.¹¹⁶ In performing functions and exercising powers as administrator, the administrator may undertake investigations into past practices of the C&G Division and its branches.¹¹⁷

78 The administrator is entitled to remuneration for necessary work properly performed by them in relation to the administration. The remuneration is to be paid from the funds of the CFMEU.¹¹⁸

Other provisions of the FWRO Act

79 Other provisions of the FWRO Act are relevant to the issues raised in the special case. Section 5 of the FWRO Act, referred to in s 323B(1) in Pt 2A of Ch 11, sets out the Commonwealth Parliament's intention in enacting the FWRO Act, relevantly, in the following terms:

"(1) It is Parliament's intention in enacting this Act to enhance relations within workplaces between federal system employers and federal system employees and to reduce the adverse effects of industrial disputation.

(2) Parliament considers that those relations will be enhanced and those adverse effects will be reduced, if associations of employers and employees are required to meet the standards set out in this Act in order to gain the rights and privileges accorded to associations under this Act and the Fair Work Act.

...

(4) It is also Parliament's intention in enacting this Act to assist employers and employees to promote and protect their economic and social interests through the formation of employer and employee organisations, by providing for the registration of those associations and according rights and privileges to them once registered.

115 FWRO Act, s 323K(5)(b) read with s 323A.

116 FWRO Act, s 323K(3).

117 FWRO Act, s 323K(2A).

118 FWRO Act, s 323M(1) and (2).

- (5) Parliament recognises and respects the role of employer and employee organisations in facilitating the operation of the workplace relations system."

80 In short, Parliament's intention in enacting the FWRO Act was and remains "to enhance relations within workplaces between federal system employers and federal system employees and to reduce the adverse effects of industrial disputation"¹¹⁹ and it considers those relations will be enhanced if associations of employers and employees are required to meet the standards set out in the FWRO Act in order to gain the rights and privileges accorded to associations under the FWRO Act and the *Fair Work Act*.¹²⁰ It is also Parliament's intention to assist employers and employees to promote and protect their economic and social interests through the formation of employer and employee organisations, by providing for the registration of those associations and according rights and privileges to them once registered.¹²¹

81 Section 5(3) of the FWRO Act states that the standards set out in the Act:

- "(a) ensure that employer and employee organisations registered under this Act are representative of and accountable to their members, and are able to operate effectively; and
- (b) encourage members to participate in the affairs of organisations to which they belong; and
- (c) encourage the efficient management of organisations and high standards of accountability of organisations to their members; and
- (d) provide for the democratic functioning and control of organisations; and
- (e) facilitate the registration of a diverse range of employer and employee organisations."

82 Chapter 2 of the FWRO Act, headed "Registration and cancellation of registration", sets out the types of associations that may apply for registration, which include a federally registrable association of employees.¹²² An association of employees is federally registrable if it is a constitutional corporation or "some

119 FWRO Act, s 5(1).

120 FWRO Act, s 5(2).

121 FWRO Act, s 5(4).

122 FWRO Act, s 18B.

or all of its members are federal system employees".¹²³ The CFMEU is an "organisation" within the meaning of s 6 of the FWRO Act.¹²⁴ Some, indeed a majority, of the members of the CFMEU are employed, or are usually employed, by a constitutional corporation and, moreover, some, indeed a majority, of the members of the CFMEU are "national system employees" as defined in s 13 of the *Fair Work Act* and, consequently, "federal system employees" within the meaning of the FWRO Act. The registration of an organisation can be cancelled on application to the Federal Court by the Minister or a person or organisation interested, including on the grounds that the conduct of the organisation, or a substantial number of the members of the organisation, has prevented or hindered Parliament's intention in enacting the FWRO Act.¹²⁵

CFMEU Rules

83 As an "organisation" under the FWRO Act, the CFMEU must have rules that make provision as required by the FWRO Act.¹²⁶ There are such rules for the CFMEU ("the CFMEU Rules").¹²⁷ Under r 27(i) of the CFMEU Rules, three Divisions were established: the C&G Division, the Manufacturing Division and the Maritime Union of Australia Division. Under r 27(iv) of the CFMEU Rules, each Division must have its own set of rules and there are, therefore, separate rules for the C&G Division and its Divisional branches ("the C&G Division Rules").¹²⁸

84 The objects of the CFMEU, stated in r 4 of the CFMEU Rules, include:

- "(a) To uphold the right of combination of labour, and to improve, protect, and foster the best interests of the [CFMEU] and its members, and to assist them to obtain their rights under industrial and social legislation.

...

123 FWRO Act, s 18B(1) read with s 6 definition of "federal system employee".

124 FWRO Act, s 6 definition of "organisation" and Pt 2 of Ch 2.

125 FWRO Act, s 28(1)(a).

126 FWRO Act, s 140 read with s 141.

127 Defined as the "National Rules" in cl 1 of the Scheme.

128 Defined as the "Divisional Rules" in cl 1 of the Scheme.

- (d) To do all things conducive to the welfare and organisation of the working class.

...

- (i) To secure or assist in securing legislation for safety in or in connection with the Industries of the [CFMEU] and for the general and material well being of members.

...

- (t) To take part in any or all questions of matters affecting or involving the wages and conditions of labour.

- (w) To hold, purchase, lease, transfer, rent, sell, mortgage or otherwise deal in property and to enter into contracts and agreements in connection with same and to do all such other things as may be deemed necessary in connection therewith for the purpose of furthering directly or indirectly any one or more objects, provided that where such property is in the care, custody and control of a Division, it shall be subject to governance in accordance with the Divisional Rules and the National Rules.

- (x) To raise funds by levies and/or other means for the furtherance of any one or more objects.

- (y) *To raise political levies, donate to and/or affiliate with political parties ...*

...

- (aa) To do all such other acts and things as are incidental or in any way related to the carrying out of any one or more of the above objects." (emphasis added)

The control and application of the funds and property of the CFMEU are governed by rr 23 and 27 of the CFMEU Rules and r 14 of the C&G Division Rules. Rule 23(vi) of the CFMEU Rules ensures that any funds under the control of a body, including a Division, are dealt with by that body "on behalf of" the CFMEU and shall be invested wherever possible in the name of the CFMEU. The sub-rule provides:

"The funds of the [CFMEU] shall be under the control of the body which receives such funds pursuant to the Rules of the [CFMEU] and such bodies shall deal with the funds on behalf of the [CFMEU]. The funds and property of the [CFMEU] shall be invested wherever possible in the name of the [CFMEU]. Any moneys may have the name of the body controlling the

funds added to the name of the [CFMEU]. In the case of Divisions, money received by the Divisions shall be under the control of the body in that Division which, by the rules of that Division is given control and shall be invested in the name of the [CFMEU], subject to the last immediately preceding sentence hereof. Where it is not possible or convenient to hold property in the name of the [CFMEU] the property shall be held in the name of trustees under the Rules of such bodies.

... Nothing in this sub-rule prevents the [CFMEU], a Division, a Branch or a Divisional Branch from entering into an agreement with a trade or industrial union or organisation of employees registered under any legislation of any State of the Commonwealth for the investment of funds on a joint basis or a basis on which the funds are held in common *so long as the funds are treated, for all purposes, at least as funds of [the CFMEU]* ..." (emphasis added)

86 Under r 27(ii) and (iii) of the CFMEU Rules, each Division has autonomy in relation to its funds and property subject to r 23 of the CFMEU Rules. Unsurprisingly, r 14 of the C&G Division Rules addresses "Funds and Property" consistently with r 23(vi) of the CFMEU Rules, by providing that (i) the funds of the Division are to be invested wherever possible "in the name of" the CFMEU and, where that is not possible, investments are made in the name of the Divisional Trustees,¹²⁹ and (ii) the property of the Division is held in the name of the CFMEU although it is under the control of the Divisional Executive.

87 The rules must also provide for the powers and duties of the committees of the organisation and its branches, and the powers and duties of holders of office in the organisation and its branches.¹³⁰

Question 1: Head of power

88 The plaintiffs submitted that Pt 2A of Ch 11 of the FWRO Act¹³¹ is invalid because it is not sufficiently connected with any head of power in s 51 of the *Constitution* for two reasons. They submitted, first, that Pt 2A is not supported by s 51(xx) of the *Constitution* on the basis that the CFMEU is not a trading corporation because its trading activities are only carried out incidentally to its core function of industrial advocacy, and second, that Pt 2A is best characterised as a law which empowers the Minister to create rights and liabilities and the Part's

129 C&G Division Rules, r 14(iv).

130 FWRO Act, s 141(1)(b)(i).

131 The plaintiffs did not make any separate submissions on s 177A of the *Fair Work Act*.

connection to anything else, including s 51(xx) trading corporations and their employees, is "tenuous and insubstantial".

89 In response, the first and second defendants ("the Commonwealth defendants") submitted that Pt 2A is properly characterised as a law "to enable the C&G Division swiftly to be returned to a state in which it is governed and operates lawfully and effectively in its members' interests, for the ultimate goal of facilitating the operation of the federal workplace relations system". They contended that Pt 2A is therefore supported by s 51(xx) for two reasons (noting that the Commonwealth defendants only needed to succeed on their first argument, not both). First, the CFMEU is an association of employees, a majority of whom are employed, or usually employed, by a constitutional corporation and, accordingly, Pt 2A is supported by s 51(xx) for substantially the same reason what is now the FWRO Act was held to be supported by s 51(xx) in *New South Wales v The Commonwealth (Work Choices Case)*¹³² and, second, Pt 2A operates primarily on the CFMEU, which is a trading corporation.

Applicable principles

90 The applicable principles were not in dispute. A law of the Commonwealth Parliament is made "with respect to" the subject matter of a head of Commonwealth power "when it relates to or affects that subject matter and the connection is not 'so insubstantial, tenuous or distant' that it cannot properly be described as a law with respect to that subject matter".¹³³ The constitutional text – the subject matter of the power – is to be construed "with all the generality which the words used admit".¹³⁴ The character of any law is determined by reference to "the rights, powers, liabilities, duties and privileges which it creates"; the practical as well as the legal operation of the law must be examined".¹³⁵ It is necessary to consider the law in context, as part of any wider scheme of regulation, rather than in isolation.¹³⁶ And then there is the "further general proposition that 'a law with

132 (2006) 229 CLR 1 at 114-115 [178], 153 [322]. See also *Spence v Queensland* (2019) 268 CLR 355 at 405-406 [58].

133 *Spence* (2019) 268 CLR 355 at 456 [197], citing *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 208 [66], in turn citing *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 369, in turn citing *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79; see also 405 [57], 433 [132]. See also *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at 42 [22].

134 *Spence* (2019) 268 CLR 355 at 456 [197] and the authorities cited; see also 405 [58].

135 *Spence* (2019) 268 CLR 355 at 456 [198] and the authorities cited; see also 405 [58].

136 *Spence* (2019) 268 CLR 355 at 456-457 [198].

respect to a subject matter within Commonwealth power does not cease to be valid because it affects a subject outside power or can be characterised as a law with respect to a subject matter outside power", even if that alternative characterisation may be regarded as the prime or predominant character of a law (ie the "dual characterisation" principle).¹³⁷ If there is *a* connection that is not "insubstantial, tenuous or distant" between what the law does and the subject matter of a head of Commonwealth power, "the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice".¹³⁸

Part 2A supported by s 51(xx) of the Constitution because it regulates the conduct of a registered organisation

91 The majority judgment in the *Work Choices Case*¹³⁹ provides a complete answer to the plaintiffs' claim of want of legislative power. As submitted by the Commonwealth defendants, Pt 2A of Ch 11 of the FWRO Act, like Sch 1 to the *Workplace Relations Act 1996* (Cth), which was considered in the *Work Choices Case*, is supported by s 51(xx) of the *Constitution* because the CFMEU is an association of employees a majority of whom are employed, or usually employed, by a constitutional corporation.

92 The *Work Choices Case*¹⁴⁰ concerned amendments made to the *Workplace Relations Act*. Relevantly, Sch 1 to the *Workplace Relations Act* (headed "Registration and Accountability of Organisations"), the predecessor to the FWRO Act, provided for the registration of trade unions and organisations of employers and the regulation of their internal affairs, and required those organisations to meet certain standards in order to gain rights and privileges of registration.¹⁴¹ The Court in the *Work Choices Case* found Sch 1 to the *Workplace Relations Act* to be validly supported by s 51(xx) of the *Constitution*.

137 *Work Choices Case* (2006) 229 CLR 1 at 127 [219], 128 [223]. See also *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 13; *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 151; *Spence* (2019) 268 CLR 355 at 463 [219].

138 *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16]; *Work Choices Case* (2006) 229 CLR 1 at 104 [142]; *Spence* (2019) 268 CLR 355 at 405 [57].

139 (2006) 229 CLR 1 at 114-115 [178], 153 [322]. See also *Spence* (2019) 268 CLR 355 at 405-406 [58].

140 (2006) 229 CLR 1.

141 *Work Choices Case* (2006) 229 CLR 1 at 151 [309].

The majority of the Court¹⁴² adopted the reasoning of Gaudron J in *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union*,¹⁴³ holding that the legislative power conferred by s 51(xx) of the *Constitution* "extends to laws prescribing the industrial rights and obligations of [constitutional] corporations and their employees and the means by which they are to conduct their industrial relations".

93 The majority also held that Sch 1 was supported by s 51(xx) as:¹⁴⁴

"... it also is within power to authorise registered bodies to perform certain functions within that scheme of regulation. It also is within power to require, as a condition of registration, that these organisations meet requirements of efficient and democratic conduct of their affairs."

94 Through a process of amendment of the *Workplace Relations Act* (including renaming), Sch 1 to that Act became the FWRO Act. No one sought to reopen the holdings in the *Work Choices Case*, or otherwise questioned the validity of the FWRO Act.

95 Consistent with this Court's holding in the *Work Choices Case*, Pt 2A of Ch 11 of the FWRO Act is not too "insubstantial, tenuous or distant" in its connection to s 51(xx) of the *Constitution* on the basis that it seeks, in its terms, to regulate the conduct of the C&G Division of the CFMEU, as a registered organisation that performs certain functions in the regulation of employer-employee relationships.

96 First, Pt 2A applies only to an organisation that is registered under, and owes its ongoing existence to, the FWRO Act.¹⁴⁵ Consistent with the reasoning of the majority in the *Work Choices Case*, registration under the FWRO Act confers a range of rights, privileges and obligations on organisations.¹⁴⁶ Previous decisions of this Court concerning earlier industrial relations schemes that were enacted in reliance on the conciliation and arbitration power in s 51(xxxv) of the *Constitution* have long recognised that when Parliament creates organisations and gives them functions, rights and privileges under industrial relations law, Parliament has wide powers over the organisations and those functions, rights and privileges it has

142 *Work Choices Case* (2006) 229 CLR 1 at 115 [178]; see also 115-116 [181], 153 [319]-[322].

143 (2000) 203 CLR 346 at 375 [83].

144 *Work Choices Case* (2006) 229 CLR 1 at 153 [322].

145 See FWRO Act, s 27.

146 (2006) 229 CLR 1 at 151 [309], 152 [316].

created.¹⁴⁷ There is no reason why the power of the Parliament to regulate or control industrial organisations created as an incident of the wider industrial relations framework should be any different as between s 51(xx) and s 51(xxxv).

97 Second, s 323B(3) identifies a list of subject matters that the scheme the subject of any determination must address.¹⁴⁸ As is self-evident, there is much commonality of subject matter in what the scheme must provide for and the matters that are dealt with under the FWRO Act in relation to a registered organisation – for example, the election of officers,¹⁴⁹ the alteration of rules,¹⁵⁰ and the taking of disciplinary action.¹⁵¹ Such subject matters are directed towards requiring the C&G Division to meet the requirements of "efficient and democratic conduct" of its affairs, as was identified by the majority in the *Work Choices Case* to be a feature of Sch 1 to the *Workplace Relations Act*.¹⁵²

98 Third, the power in s 323B for the Minister to determine, in writing, a scheme for the administration of the C&G Division and its branches can only be exercised if the Minister is satisfied that, having regard to the Parliament's intention in enacting the FWRO Act,¹⁵³ it is in the public interest for the C&G Division and its branches to be placed under administration. That is a mandatory consideration. Those objects are directly related to prescribing the means by which organisations of employees and employers are to conduct their industrial relations.

99 Fourth, the administrator must perform functions and exercise powers in the best interests of the members of the C&G Division and its branches and with regard to the objects of the CFMEU as defined in the CFMEU Rules.¹⁵⁴ Both the

147 See, eg, *R v Ludeke; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 636.

148 See [74] above.

149 FWRO Act, s 323B(3)(c) and (d) (scheme) and ss 143-147, 182-199 (generally).

150 FWRO Act, s 323B(3)(g) (scheme) and ss 141(1)(b)(xiii), 156-162 (generally).

151 FWRO Act, s 323B(3)(e) (scheme) and ss 210-220 (generally).

152 See (2006) 229 CLR 1 at 153 [322].

153 FWRO Act, s 5. See [79] above.

154 FWRO Act, s 323K(5).

concepts of the rules of an organisation and the members of an organisation are grounded in the FWRO Act.¹⁵⁵

100 Question 1 should be answered "No". Part 2A of Ch 11 of the FWRO Act is validly supported by s 51(xx) of the *Constitution*. Its connection to s 51(xx) is not "insubstantial, tenuous or distant". It is unnecessary and inappropriate¹⁵⁶ to address the Commonwealth defendants' alternative argument that the CFMEU is a trading corporation.

Questions 2 and 3: Implied freedom of political communication

101 Whether any particular legislative provisions impermissibly burden freedom of political communication raises three questions:¹⁵⁷ Do the provisions effectively burden freedom of political communication? Is the purpose of the provisions legitimate, being consistent with the maintenance of the constitutionally prescribed system of government? Are the provisions reasonably appropriate and adapted to advance that purpose in a manner consistent with the maintenance of the constitutionally prescribed system of government?

Plaintiffs' submissions

102 The plaintiffs' complaint was twofold. First, they contended that the Administration Act and, specifically, s 323K(1)(a) and (d) of the FWRO Act ("the impugned laws") infringed the implied freedom of political communication. As noted above, s 323K(1)(a) gives control of the property and affairs of

155 FWRO Act, ss 140-142, Ch 6.

156 *Lambert v Weichelt* (1954) 28 ALJ 282 at 283; *Tajjour v New South Wales* (2014) 254 CLR 508 at 587-589 [173]-[176]; *Knight v Victoria* (2017) 261 CLR 306 at 324-326 [32]-[37]; *Clubb v Edwards* (2019) 267 CLR 171 at 192-193 [32]-[36], 216-217 [135]-[138], 287-288 [329]-[332]; *Zhang v Commissioner of the Australian Federal Police* (2021) 273 CLR 216 at 230 [22]-[23]; *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at 247-249 [56]-[60]; *Ruddick v The Commonwealth* (2022) 275 CLR 333 at 387-388 [145]; *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at 549-550 [20], 576 [114], 602-603 [208].

157 See the test identified in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562, 567, as modified and refined in *Coleman v Power* (2004) 220 CLR 1 at 50 [93], 51 [95]-[96]; *McCloy v New South Wales* (2015) 257 CLR 178 at 193-195 [2]; and *Brown v Tasmania* (2017) 261 CLR 328 at 359 [88], 363-364 [104], 375-376 [156], 398 [236], 413 [271], 416-417 [277]-[278], 432-433 [319]-[325]. See also *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 22-23 [44]-[46], 37 [93], 51-53 [131]-[134]; *Babet v The Commonwealth* [2025] HCA 21 at [49], [72], [91].

the C&G Division and its branches to the Administrator and s 323K(1)(d) gives the Administrator power to perform any function and exercise any power that the C&G Division, its branches or officers could exercise were it not under administration.¹⁵⁸

103 Second, the plaintiffs contended that the Scheme is not authorised by s 323B(1). They submitted that, as a result of the Scheme, the members of the C&G Division lost their collective power given by the CFMEU Rules to participate in political communications as the C&G Division could no longer make decisions under the CFMEU Rules or the C&G Division Rules about expenditure on political communication and about supporting candidates at elections.

104 Although expressed as two separate points, the arguments overlapped. In particular, the second point (stated as a point about the ambit of the power given by s 323B(1)) is better understood as an argument that s 323B(1) is so broadly expressed as to require it to be read down "to permit only those exercises of discretion that are within constitutional limits" – that is, the statutory question "converges" with the constitutional question.¹⁵⁹ Given the breadth of the power of the Minister to make a determination under s 323B(1), the validity of the Scheme can be tested by asking whether, if it had been enacted as legislation, it would have infringed the implied freedom.¹⁶⁰

Construction of the impugned laws

105 Whether the impugned laws infringe the implied freedom of political communication in authorising, and in their application to, the Scheme cannot be answered without first construing the relevant provisions.

106 As the Commonwealth defendants contended, there is nothing in the terms of the Administration Act or the Scheme which prohibits political communication or political donations. Rather, the plaintiffs submitted that s 323K(1)(a) and (d) impose a burden on freedom of political communication because the effect of the provisions is that the C&G Division is therefore "unable to use its property to engage in political communication, or to make political donations or incur expenditure except with permission of the Administrator", impairing an "essential function" of the CFMEU. At its highest, the plaintiffs' case was that there is a *potential* burden as the statute and the Scheme would "authorise" or allow for the

158 See [76] above.

159 *Palmer v Western Australia* (2021) 272 CLR 505 at 547 [122].

160 See *Palmer* (2021) 272 CLR 505 at 547 [124]; *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 12 [19], 43 [170]-[171], 73 [327]; 419 ALR 457 at 468, 510, 550.

"existence of the possibility" of a veto by the Administrator over political communication.

107 Reference to the Administrator having a "veto" over political communication is apt to mislead. Under the Scheme, the Administrator decides how the funds of the C&G Division are to be applied. An available decision *may* be for the Administrator to apply funds to political communication; the contrary decision may also be open.¹⁶¹ Whether deciding not to apply the funds of the C&G Division for political purposes is an available course of action for the Administrator would have to be determined from time to time and in light of the relevant facts and circumstances. As the Commonwealth defendants observed, there is no challenge to the particular exercise of the Administrator's powers before this Court, nor is such a challenge raised by the special case.

108 It is necessary to decide any issue of that kind from time to time and in light of the relevant facts and circumstances because, in performing functions and exercising powers as administrator – including making any decisions with respect to political communication – the administrator is subject to two constraints. First, the administrator must be satisfied that they are "acting in the best interests of the members" of the C&G Division and its branches.¹⁶² Second, although any action taken by the administrator is to have effect despite the rules of the CFMEU,¹⁶³ the administrator *must* "have regard to the objects of the CFMEU as defined in the rules of the CFMEU",¹⁶⁴ one of which is explicitly "[t]o raise political levies, donate to and/or affiliate with political parties".¹⁶⁵

Question 1: Burden

109 It follows that the question whether the impugned laws do constitute a relevant "burden" in authorising, and in their application to, the Scheme requires close examination. The word "burden" may obscure important features of the law in issue by focusing too closely (even solely) upon whether an impugned law may affect future political communication without giving proper attention to the full legal context within which the impugned law operates or will operate.

161 See FWRO Act, s 323N.

162 FWRO Act, s 323K(5)(a).

163 FWRO Act, s 323F. See [75] above.

164 As at the commencement of the Scheme, so far as they are lawful: FWRO Act, s 323K(5)(b). See [77] above.

165 CFMEU Rules, r 4(y). See [84] above.

110 That risk is especially relevant when, as here, the law in issue concerns the management and control of an incorporated voluntary association which has, as one of its purposes, participating in political affairs. The membership of the CFMEU (or the C&G Division) and those members who might be seen as influencing the CFMEU's (or the C&G Division's) actions are all individuals. They are not a single corporate entity. Before the impugned laws were passed and the C&G Division went into administration, the identity of those individuals often changed. To speak of either group as a "collective" treats them as forming a single coherent body; they do not. The freedom of the individuals to participate in political communication is wholly unaffected by the impugned laws. The freedom of the C&G Division to participate is likewise wholly unaffected. What the law does is replace the management structures of the C&G Division (for the duration of the administration). The purposes and objects of the CFMEU are unaltered.

111 In sum, to say that there is a loss of "collective" power to participate in political communication makes several wrong assumptions. First, the statement assumes, wrongly, that the membership of the CFMEU or the membership of the C&G Division could and did control particular decisions of elected officials about whether and how to expend CFMEU funds or advocate on political issues. The only power members had over elected officials and their decision-making was their ability to influence the elected officials from day to day coupled with their power to vote at elections for officials.

112 Second, that statement assumes that any change in control of the organisation is a "burden" on freedom of political communication. It demands that existing organisations having political purposes must always be permitted to continue under existing organisational and management arrangements.

113 Third, it implicitly assumes that the members of the C&G Division (ie, the collective) cannot lawfully regroup or reorganise to pursue political aims and participate in political debate of the kind which otherwise would have been undertaken by the organisation brought under administration. As the Commonwealth defendants submitted, there is no restriction on the ability of members to engage in political activity either with each other or as an association of people. The possibility of regrouping and reorganising either as a new organisation of employees or by participating in some other existing organisation of employees is real.¹⁶⁶

114 Fourth, it assumes, wrongly, that the Administrator must not permit the organisation to participate in political affairs. But that is not what the Administration Act, read with the CFMEU Rules and the Scheme, provides. The only reference within those instruments to political communication is a

166 Nothing in Div 2 of Pt 2A of Ch 11 of the FWRO Act compels a different conclusion.

positive requirement for the administrator to have regard to the objects of the CFMEU to raise political levies, donate to and/or affiliate with political parties when performing functions and exercising powers as administrator.

115 There is no burden on the freedom of political communication of the C&G Division. The C&G Division and its members' ability to engage in political communication is not impaired or adversely affected by the impugned laws. However, even if there was a burden, that burden would be imposed for a legitimate purpose and justified for the reasons set out below.

Question 2: Legitimate purpose

116 The next question is whether the purpose of the impugned laws is legitimate, being consistent with the maintenance of the constitutionally prescribed system of government. That purpose is the same as the purpose of the Scheme which was authorised by s 323B(1) of the FWRO Act.

Ascertaining legislative purpose

117 Because of the way in which the plaintiffs framed this part of their argument, and their reliance on what was said in the course of debate about the *Fair Work (Registered Organisations) Amendment (Administration) Bill 2024* ("the Bill"), which enacted Pt 2A of Ch 11 of the FWRO Act, as well as oral and other communications between Senator Murray Watt, the Minister for Employment and Workplace Relations, and others, it is necessary first to deal with some basic and settled propositions about ascertaining legislative purpose.

118 Section s 15AA of the *Acts Interpretation Act 1901* (Cth) ("the AIA") states that, in interpreting a provision of an Act, "the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation". In the interpretation of a provision of an Act, the material capable of assisting in the ascertainment of the meaning of a provision is material that is part of the Act,¹⁶⁷ as well as "material not forming part of the Act [which] is capable of assisting in the ascertainment of the meaning of the provision".¹⁶⁸ Consideration may be given to the latter material, often described as extrinsic material, only for the limited purposes specified in s 15AB(1), namely:

¹⁶⁷ AIA, s 13.

¹⁶⁸ AIA, s 15AB(1).

41.

- "(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
- (b) to determine the meaning of the provision when:
 - (i) the provision is ambiguous or obscure; or
 - (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable."

119

That the use of extrinsic material is limited to those purposes is reinforced by ss 15AB(3) and 15AB(2). Section 15AB(3), often overlooked, provides that "[i]n determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to ... the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act". Section 15AB(2) begins, "[w]ithout limiting the generality of subsection (1), the material that may be considered *in accordance with that subsection* in the interpretation of a provision of an Act includes" (emphasis added), among other things:

- "...
- (e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;
- (f) the speech made to a House of the Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in that House;
- ...
- (h) any relevant material in the Journals of the Senate, in the Votes and Proceedings of the House of Representatives or in any official record of debates in the Parliament or either House of the Parliament."

120 These provisions supplement, but do not displace, the common law.¹⁶⁹ Under the common law, the only limit placed upon the kinds of extrinsic material to which reference may be made is the relevance of the material to the context,¹⁷⁰ though there are limits on the use that may be made of it. The extrinsic material may not be used to place upon the words a meaning they cannot reasonably bear or to identify or give effect to the meaning parliamentarians, drafters or others subjectively intended the words to have.¹⁷¹ There is a distinction, an important distinction, to be drawn between *objective* statutory purpose – which is a question of construction of the Act drawn from the text and context – and subjective political motive.¹⁷² It is in the context of the first inquiry – the task of construing statutes to ascertain objective statutory purpose and the meaning of the text of the statute in issue – that Explanatory Memoranda and Second Reading Speeches are frequently relied on, although they are not to be taken to be an "infallible and exhaustive guide".¹⁷³

121 There is then the further general proposition that there is a distinction between the purpose of an Act and the specific means utilised to give effect to that purpose. If an Act has other purposes connected with a subject matter within power and only incidentally restricts political communication, the Act is valid if it is reasonably appropriate and adapted to that other purpose.¹⁷⁴

Legitimate purpose of the Administration Act

122 The Commonwealth defendants submitted that the purpose of the Administration Act is to enable the C&G Division swiftly to be returned to a state in which it is governed and operates lawfully and effectively in its members'

169 See, eg, *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 99, 112.

170 See, eg, *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

171 See, eg, *Monis v The Queen* (2013) 249 CLR 92 at 147 [125]. See also Morris and Sorial, "Farm Transparency and the Problem of Statutory Purpose in the Implied Freedom Test" (2024) 35 *Public Law Review* 257 at 261.

172 See, eg, *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 389 [25]; *Monis* (2013) 249 CLR 92 at 147 [125]; *Brown* (2017) 261 CLR 328 at 391 [208]; *Commissioner of Taxation v Murray* (1990) 21 FCR 436 at 449. See also *Fairfax* (1965) 114 CLR 1 at 13.

173 *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 271 CLR 495 at 524 [72]; see also 522-524 [67]-[71]. See also *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518.

174 See fn 137 above.

interests, for the ultimate goal of facilitating the operation of the federal workplace relations system. The plaintiffs, on the other hand, submitted that the Administration Act had two further impermissible purposes: to suppress political donations and activity by the C&G Division; and to place control of the C&G Division in the hands of the administrator because of past actual or alleged unlawfulness.

123 In light of the text, context and purpose of the Administration Act, the Commonwealth defendants' submission about purpose should be accepted. The provisions of Pt 2A that establish that it is validly supported by s 51(xx) of the *Constitution*¹⁷⁵ compel that conclusion. Part 2A does not relevantly confer any novel powers or functions on the administrator which were not already provided for in the FWRO Act, even if those powers and functions were previously exercised by the C&G Division itself, or the Federal Court. Prior to the introduction of Pt 2A into Ch 11, the FWRO Act, for example, already conditioned registration and cancellation of registration of an organisation by reference to "Parliament's intention in enacting this Act";¹⁷⁶ prescribed circumstances in which people would be disqualified from holding office unless leave was granted by the Federal Court;¹⁷⁷ and stated that the Federal Court may order the reconstitution of the branch of a registered organisation where it has ceased to function effectively, including by approving a scheme.¹⁷⁸

124 In fact, prior to the passing of the Administration Act, an application had been made to the Federal Court under s 323 of the FWRO Act for a declaration that the C&G Division had ceased to function effectively and for approval of a scheme of administration in materially similar terms to the Scheme determined under Pt 2A. That application is addressed below.

Plaintiffs' contentions in relation to illegitimate purpose

125 Although accepting that the Commonwealth's identified purpose in enacting Pt 2A is a legitimate purpose, the plaintiffs contended that a further illegitimate purpose of Pt 2A was to suppress political donations and activity by the C&G Division. In support of that contention, the plaintiffs sought to rely upon various materials in relation to the Bill which introduced the Administration Act,

¹⁷⁵ See [96]-[99] above.

¹⁷⁶ See, eg, FWRO Act, ss 19(1)(i) and 28(1)(a).

¹⁷⁷ FWRO Act, ss 215-218.

¹⁷⁸ FWRO Act, s 323.

including the Explanatory Memorandum,¹⁷⁹ the Revised Explanatory Memorandum,¹⁸⁰ the Second Reading Speech,¹⁸¹ and other aspects of what they described as the "legislative history". Nothing in any of these materials supports the plaintiffs' contention. It is necessary to address each in turn.

126

First, the Explanatory Memorandum recorded that, since July 2024, serious allegations had been raised about the conduct of some officials and associates of the C&G Division, including allegations of corruption, criminal conduct and other serious misconduct including bullying and harassment and general disregard for workplace laws.¹⁸² It then recorded that the General Manager of the Fair Work Commission formed the view that the majority of the branches of the C&G Division "were no longer able to function effectively, including in the interests of members, and that there were no effective means under the relevant rules to address the situation"¹⁸³ and, as a result, the General Manager applied to the Federal Court under s 323 of the FWRO Act for a declaration to that effect.¹⁸⁴ The Explanatory Memorandum then set out an extract from the Concise Statement accompanying the application which described the CFMEU's history of non-compliance with workplace laws since 2003, including the fact that the CFMEU had been the subject of findings of contraventions of federal workplace laws on more than 1,500 occasions in approximately 213 proceedings, resulting in total penalties ordered against the CFMEU of at least \$24 million plus at least \$4 million ordered against its officeholders, employees, delegates and members.¹⁸⁵ The Explanatory Memorandum then listed other serious allegations of criminal conduct and other unlawful conduct by current and former officeholders, employees and other representatives of the C&G Division which the General

179 Australia, Senate, *Fair Work (Registered Organisations) Amendment (Administration) Bill 2024*, Explanatory Memorandum.

180 Australia, House of Representatives, *Fair Work (Registered Organisations) Amendment (Administration) Bill 2024*, Revised Explanatory Memorandum.

181 Australia, Senate, *Parliamentary Debates* (Hansard), 12 August 2024 at 2698-2699.

182 Australia, Senate, *Fair Work (Registered Organisations) Amendment (Administration) Bill 2024*, Explanatory Memorandum at [7].

183 Australia, Senate, *Fair Work (Registered Organisations) Amendment (Administration) Bill 2024*, Explanatory Memorandum at [8].

184 Australia, Senate, *Fair Work (Registered Organisations) Amendment (Administration) Bill 2024*, Explanatory Memorandum at [9].

185 Australia, Senate, *Fair Work (Registered Organisations) Amendment (Administration) Bill 2024*, Explanatory Memorandum at [9].

Manager had stated in the application to the Federal Court that they had become aware of through media reporting in July 2024.¹⁸⁶

127 It was in that context that the Explanatory Memorandum stated it was the Government's view that the legislative amendments proposed by the Bill were urgently required to ensure a decision could be made as swiftly as possible about whether to put a scheme of administration in place.¹⁸⁷ The stated purpose was to "seek to protect the interests of members of the [C&G Division], and if a scheme of administration is determined, [to] seek to help return the [C&G Division] to a position where it is democratically controlled by those who promote and act in accordance with Australian laws, including workplace laws".¹⁸⁸ At the end of the Explanatory Memorandum, it stated that the "proposed legislation is necessary to end ongoing dysfunction within the [C&G] Division and to ensure it is able to operate effectively in the interests of its members".¹⁸⁹ The Explanatory Memorandum did not refer to political donations.

128 The Revised Explanatory Memorandum repeated the matters set out in the Explanatory Memorandum, including that the amendments "seek to protect the interests of members of the [C&G] Division, and if a scheme of administration is determined, would seek to help return the [C&G] Division to a position where it is democratically controlled by those who promote and act in accordance with Australian laws, including workplace laws. The proposed legislation is necessary to end ongoing dysfunction within the [C&G] Division and to ensure it is able to operate effectively in the interests of its members."¹⁹⁰ Again, it did not refer to political donations.

129 The Second Reading Speech on 12 August 2024 did not refer to political donations. The speech, again, repeated the history set out in the Explanatory Memoranda and described the Bill in these terms:

186 Australia, Senate, *Fair Work (Registered Organisations) Amendment (Administration) Bill 2024*, Explanatory Memorandum at [10].

187 Australia, Senate, *Fair Work (Registered Organisations) Amendment (Administration) Bill 2024*, Explanatory Memorandum at [11].

188 Australia, Senate, *Fair Work (Registered Organisations) Amendment (Administration) Bill 2024*, Explanatory Memorandum at [11].

189 Australia, Senate, *Fair Work (Registered Organisations) Amendment (Administration) Bill 2024*, Explanatory Memorandum at [11].

190 Australia, House of Representatives, *Fair Work (Registered Organisations) Amendment (Administration) Bill 2024*, Revised Explanatory Memorandum at [11].

"For some time now, the government has made clear that, if the matter was not resolved before parliament returned, we would introduce legislation to facilitate administration, if it was determined to be in the public interest.

It is the government's firm view that enabling administration, not deregistration, is the strongest action to take in these circumstances.

Deregistration of the [C&G] Division would not stop the union from participating in a range of industrial activities, like bargaining. Placing the [C&G] Division into administration would maintain the regulation and additional oversight that applies to registered organisations and ensure the division acts in the best interests of its members.

This bill amends the [FWRO Act] to allow the minister to determine a scheme of administration for the [C&G] Division, if satisfied it is in the public interest to do so.

The bill contains a non-exhaustive list of the matters that may be included in a scheme – such as the suspension or removal of officers, taking disciplinary action, and making changes to the [C&G] Division's rules.

A scheme of administration would be targeted towards the [C&G] Division of the CFMEU, and would be time limited. It will not apply to other unions or to other divisions of the CFMEU.

The bill includes strong powers for the administrator and would allow them to take action necessary to restore the effective management and operation of the [C&G] Division.

Under a scheme of administration, the administrator would have control of the property and affairs of the [C&G] Division and its branches. They would have the power to:

- manage the property of the division and its branches, and
- undertake any functions, or exercise any power, that officers of the division or its branches would normally undertake.

This would enable the administrator to take all necessary action to manage the affairs of the division, in the interests of members.

...

We want to ensure any administration that may be determined is undertaken fairly and with the appropriate level of scrutiny. Safeguards for the administration would include:

47.

- a limitation on the duration of the scheme to no more than three years, with provision for the minister to terminate the administration earlier with the agreement of the administrator.

They would also include:

- ensuring the administrator is subject to oversight by the General Manager of the Fair Work Commission, who may investigate whether the scheme is being effectively implemented.

...

The allegations about the behaviour of some [C&G] Division members and associates are serious, and unlawful behaviour in any workplace is unacceptable. This bill provides an effective mechanism to enable the [C&G] Division of the CFMEU to be placed into administration if it is determined to be in the public interest. The government will continue to support strong action to address these issues."

130 Given the absence of any reference to political donations or any intention of seeking to suppress political donations and activity by the C&G Division in the Explanatory Memoranda or the Second Reading Speech, the plaintiffs then sought to rely on other materials ("the further materials") in support of their contention that the Administration Act had a further, illegitimate purpose.

131 First, they sought to rely on statements made in parliamentary debates about whether the Bill should be amended to ban political donations, including Senate debates on 13 August 2024, 14 August 2024 and 15 August 2024.

132 Second, they relied on a letter from Senator Watt to Senator Michaelia Cash dated 14 August 2024, which stated that "[s]ubject to passage of the Bill, the Government commits to considering whether it is in the public interest to make a scheme of administration that includes the following features ... Limitations on donations to political parties (subject to seeking legal advice from my department)".

133 Third, they relied on a letter from Mr Irving KC, who at that point had been approached to be the administrator but was not yet appointed, to Senator Watt dated 19 August 2024 in which Mr Irving KC stated he had "determined a set of principles and goals that would guide" him as administrator, noting that he nonetheless "reached no deals or understandings about how powers invested in [him] will be exercised" and that giving a binding commitment would be "improper". Specifically, he said that "[t]he union will not engage in party politics during the administration: donations; positions at political party conferences; promotion of particular candidates".

134 Fourth, they relied on parliamentary debate in the Senate on 19 August 2024 where Senator James Paterson stated, "What we know is that some of the suggestions put forward by Senator Cash and the coalition have been agreed to in principle by the government ... They include commitments to ensuring political donations and political expenditure from the CFMEU are banned during the period of the administration."¹⁹¹

135 Subsequent to that debate, in a press conference on the same day, Senator Cash said, "I have been provided with a copy of a letter from the administrator to [Senator Watt], which clearly sets out the administrator's goals, and one of those very clear goals is to ensure that the CFMEU, in administration is not to incur any form of political campaign expenditure or make party political donations and I am prepared to accept that."

136 After the Senate agreed to the Bill, on 20 August 2024 the Bill was debated in the House, where Anne Webster MP stated that "[t]he administrator has also undertaken to ensure that the CFMEU will not engage in party politics during the administration, including making donations, having positions at party conferences or promoting candidates"¹⁹² and Paul Fletcher MP stated that "[a] very important point is that, while the CFMEU is in administration, it would be entirely inappropriate and improper for the CFMEU to continue to shovel millions of dollars towards the Labor Party in political donations. I'm pleased to say that, thanks to the assiduous work of Senator Cash, the administrator has now set out in writing the guiding principles and goals he determined before accepting the role. One of those is as follows: 'The union will not engage in party politics during the administration: donations, positions at political party conferences, and promotions of particular candidates.'"¹⁹³

137 Although stopping donations to a political party was an issue for some of the parliamentarians, the plaintiffs could not point to any amendment to the Bill reflecting anything said in any of the further materials. Put in different terms, there was nothing to link any of the further materials to the text of the Administration Act, as enacted. And neither of the letters now relied on was in the public domain. To the extent that the letters were referred to in the parliamentary debates, such references form part of the extrinsic material that the Court may consider. Otherwise, it is impermissible to have regard to the private letters. The meaning of an Act cannot be determined by reference to material that will,

191 Australia, Senate, *Parliamentary Debates* (Hansard), 19 August 2024 at 3139.

192 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 20 August 2024 at 5884.

193 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 20 August 2024 at 5836.

by reason of its private nature, not be available to all who may need to ascertain that meaning. That is consistent with the nature of the materials referred to in s 15AB(2) of the AIA, all of which are publicly available.

138 The parliamentary debate in the Senate on 15 August 2024 alluded to the existence of a letter from Senator Watt to Senator Cash, with Senator Watt stating: "We've already agreed to Senator Cash that the scheme of administration that would be applied under this legislation would ban donations to any political party for the period of the administration."¹⁹⁴ Further, as has been explained, an extract of part of the letter from Mr Irving KC was read out by Mr Fletcher MP in the parliamentary debate on 20 August 2024, after the Senate had agreed to the Bill.¹⁹⁵ But despite these references, the text of the Bill was not relevantly amended. Taken at their highest, the further materials may reveal the subjective political considerations which may have affected the views and motives of some members of Parliament. They say nothing about the objective intention of the law. It follows that, consistent with principle and s 15AB of the AIA, the further materials are not relevant to the construction of the Administration Act. And they say nothing about the purpose of the Administration Act as enacted.

139 It is for those reasons that the plaintiffs' contention that a further "illegitimate" purpose of Pt 2A was to suppress political donations and activity by the C&G Division is rejected.

Multiple purposes

140 Given the conclusion that the purpose of Pt 2A of Ch 11 of the FWRO Act is legitimate, it is unnecessary to express any concluded view on whether a law which has an illegitimate purpose will not infringe the implied freedom provided that one or more of its substantial or material ends is legitimate and it is reasonably appropriate and adapted to advancing that purpose. That proposition was not the subject of any submission in this Court. It is sufficient to observe that the proposition is inconsistent with the approach this Court has taken in assessing whether the purpose advanced by a challenged law is compatible with the constitutionally prescribed system of representative and responsible government.¹⁹⁶ That inconsistency would be even more apparent where a

194 Australia, Senate, *Parliamentary Debates* (Hansard), 15 August 2024 at 3093.

195 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 20 August 2024 at 5836.

196 See *Lange* (1997) 189 CLR 520 at 561-562, 567; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 556 [46]-[47]; *McCloy* (2015) 257 CLR 178 at 194 [2]; *Brown* (2017) 261 CLR 328 at 363-364 [102]-[104], 375-376 [156], 398 [236],

subsidiary or incidental purpose of the law was relied on to justify the burden imposed by the law even though the law was intended to curtail freedom of political communication.

Question 3: Reasonably appropriate and adapted?

141 The Administration Act in authorising, and in its application to, the Scheme is reasonably appropriate and adapted to its stated purpose – to swiftly return the C&G Division to a state in which it is governed and operates lawfully and effectively in its members' interests.

142 Parliament was responding to years of non-compliance with the law by the C&G Division (which was often engaged in by officers of the CFMEU within the C&G Division) on a scale out of proportion to any other unions.¹⁹⁷ The provisions in the Administration Act and the Scheme are directly connected to that purpose: determining a scheme for the administration of the C&G Division and giving the administrator control of the property and affairs of the C&G Division, so that the C&G Division returns to a state where it can operate lawfully and effectively in its members' interests. Section 323K(1)(a) is a necessary part of the FWRO Act as, absent control of the property and affairs of the C&G Division, that stated objective could not be achieved.

143 By comparison, s 323 of the FWRO Act was not an equally practicable means to achieve the objective of the Act as the General Manager's application to the Federal Court would have taken a significant time to determine, particularly given the proceedings would be contested and may have been appealed. As is recorded in the Second Reading Speech for the Bill, the relevant Minister, Senator Watt, intervened in the Federal Court proceedings commenced under s 323 to provide government support for the General Manager's application for the C&G Division to be placed under administration.¹⁹⁸ It was because that matter was not resolved before Parliament returned that the Government introduced legislation to facilitate administration, if it was determined to be in the public interest.¹⁹⁹

413 [271], 432 [319]-[320]; *Unions NSW v New South Wales* (2019) 264 CLR 595 at 612 [32], 624 [73]-[74], 653 [160]; *Clubb* (2019) 267 CLR 171 at 186 [5], 294 [354]; *LibertyWorks* (2021) 274 CLR 1 at 22 [45], 53 [134], 71 [183], 79 [203]; *Farm Transparency* (2022) 277 CLR 537 at 553-554 [33]-[34]. cf *Levy v Victoria* (1997) 189 CLR 579 at 619.

¹⁹⁷ See also [126]-[128] above.

¹⁹⁸ Australia, Senate, *Parliamentary Debates* (Hansard), 12 August 2024 at 2698.

¹⁹⁹ Australia, Senate, *Parliamentary Debates* (Hansard), 12 August 2024 at 2698.

144 Nor would placing only specific branches of the C&G Division under administration have been an equally practicable means of achieving the Administration Act's objective, since the purpose of the law related to the lawful and effective operation of the C&G Division as a whole. Alleged contraventions of federal industrial legislation were not confined to certain C&G Divisional branches. Further, the various branches of the C&G Division share a common "supreme governing body" and executive.

145 Action to address a corporation's unlawful or improper conduct often includes the taking of control of property. A provision giving effect to such control may be both necessary and appropriate. For example, under the *Corporations Act 2001* (Cth), an administrator appointed by the company itself, a liquidator or a secured party²⁰⁰ has control of a company's affairs and is given powers of control in relevantly identical terms to s 323K.²⁰¹ Similarly, a receiver appointed under the *Corporations Act* or the *Federal Court of Australia Act 1976* (Cth) is afforded a significant degree of control. Under s 420(1) of the *Corporations Act*, "a receiver of property of a corporation has power to do, in Australia and elsewhere, all things necessary or convenient to be done for or in connection with, or as incidental to, the attainment of the objectives for which the receiver was appointed". This includes power "to enter into possession and take control of property of the corporation in accordance with the terms of [a court order or the instrument appointing the receiver]".²⁰² Under s 57 of the *Federal Court of Australia Act*, the Court may, on such terms and conditions as the Court thinks fit, appoint a receiver.²⁰³ When in any cause pending in the Court a receiver appointed by the Court is in possession of property, "the receiver shall manage and deal with the property according to the requirements of the laws of the State or Territory in which the property is situated, in the same manner as that in which the owner or possessor of the property would be bound to do if in possession of the property".²⁰⁴

146 If the mere taking of control of property could infringe the implied freedom, then a question would arise as to whether any appointment of a liquidator, receiver or administrator would infringe the implied freedom because modern corporations frequently engage in communication on issues such as climate change, the economy, or industrial relations.

200 *Corporations Act*, ss 436A-436C.

201 *Corporations Act*, s 437A(1).

202 *Corporations Act*, s 420(2)(a).

203 *Federal Court of Australia Act*, s 57(1).

204 *Federal Court of Australia Act*, s 57(3).

Section 15A of the AIA

147 As the impugned laws do not burden the freedom of political communication in authorising, and in their application to, the Scheme and they are reasonably appropriate and adapted to advancing a legitimate purpose in any event, no question arises as to the operation of s 15A of the AIA. Given that, I express no concluded view on using s 15A of the AIA to "read down" a statutory purpose derived from the text of an Act beyond observing the following.

148 First, the point was not argued by any party or intervener. Second, the approach is not established by any decided case and nothing that is said in any decided case points towards the existence of such an approach. That is unsurprising given that the Court's task is to identify the law's purpose and not to decide or to alter its purpose. Third, on its face, the argument appears to depend upon the text of other legislative provisions, or statements made in selected passages in cases decided in other contexts.

Conclusion

149 For those reasons, the answer to Questions 2 and 3 is "No".

Question 4: Ch III of the *Constitution**Parties' submissions*

150 The plaintiffs submitted that Pt 2A is contrary to Ch III of the *Constitution* as it creates detriments that are capable of being seen as either legislative punishment or executive punishment. With respect to *legislative punishment*, the plaintiffs submitted that s 323B is properly characterised as "a bill of pains and penalties" as it involves the legislative determination of breach by a person of an antecedent standard of conduct and the legislative imposition of punishment consequent on that breach.²⁰⁵ With respect to *executive punishment*, the plaintiffs submitted that, where the Minister makes a determination under s 323B, ss 323K and 323B(3) mandate that the scheme must have certain content and certain consequences which are capable of being characterised as punishment.

151 The plaintiffs initially set out a list of detriments imposed by ss 323B and 323K that could amount to "punishment", being: interference with property; removal of officers from office; interference with contractual rights; and disenfranchisement (with respect to the power to vacate offices and control elections). In oral argument, however, the plaintiffs narrowed their focus to

205 See *Duncan v New South Wales* (2015) 255 CLR 388 at 408 [43].

s 323K, stating that the "clearest indication" of punishment was the way that s 323K "deals with property".

152 The Commonwealth defendants submitted that s 323B does not confer power to impose any measure that is prima facie punitive. Alternatively, if the plaintiffs' identified detriments could be characterised as prima facie punitive, they were justified. In relation to s 323K, the Commonwealth defendants submitted that the deprivation of property not linked to the adjudgment and punishment of guilt was not prima facie punitive.

No relevant distinction between legislative and executive punishment

153 There is no relevant distinction to be drawn in this case between legislative and executive punishment. As accepted by the plaintiffs, the test as to whether the measure is punitive is the same: a law will be contrary to Ch III if the law itself is or the law confers on the Executive or the legislature a power "to impose a measure that is properly characterised as penal or punitive".²⁰⁶ This is a "single question of characterisation",²⁰⁷ although in practice the Court has approached that question by asking two questions:

- (1) whether the law can be characterised as prima facie punitive (in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs*, the plurality proceeded on the basis that a law may be characterised as prima facie punitive having regard to the nature of the detriment imposed by the law,²⁰⁸ whether or not the detriment is of a kind which has been historically imposed by the judiciary);²⁰⁹ and

206 *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899 at 909 [35]; 415 ALR 1 at 10. See also *YBFZ* (2024) 99 ALJR 1 at 12 [17]; 419 ALR 457 at 468.

207 *YBFZ* (2024) 99 ALJR 1 at 12 [16]; 419 ALR 457 at 468, quoting *Jones v The Commonwealth* (2023) 97 ALJR 936 at 947 [43]; 415 ALR 46 at 56. See also *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 378-379 [104]-[105]; *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1016 [44]; 415 ALR 254 at 265.

208 (2024) 99 ALJR 1 at 19 [60]; 419 ALR 457 at 477-478.

209 (2024) 99 ALJR 1 at 11 [14]; 419 ALR 457 at 467. cf *Alexander* (2022) 276 CLR 336 at 397 [159]; see also 367 [72].

- (2) if the law is *prima facie* punitive, whether it has a legitimate non-punitive purpose and is reasonably capable of being seen as necessary for that purpose.²¹⁰

No legislative punishment

154 As the Commonwealth defendants submitted, s 323B cannot be characterised as "a bill of pains and penalties" as there is no legislative determination of breach by some person of an antecedent standard of conduct, and no legislative imposition on that person of punishment consequent on the determination of breach. A bill of pains and penalties will identify the specific individual or individuals said to breach the antecedent standard of conduct.²¹¹ Section 323B, however, only speaks generally of the officers or employees of the C&G Division and does not specify any individuals. This is unsurprising, given that the membership and management of the C&G Division often changes.²¹²

155 Moreover, s 323B does not arise out of any legislative determination of breach. Section 323B was enacted in response to a state of affairs where the C&G Division had ceased to function effectively, not because of a breach of an antecedent standard of conduct.²¹³ Even if the law was enacted in response to the CFMEU's unlawful activity, that was on the basis of the long history of contraventions by the CFMEU adjudicated by and proven in the Federal Court, not any adjudication by Parliament.

156 Finally, s 323HA requires the administrator to establish a complaints procedure in relation to improper, unlawful or criminal conduct and makes provision for the investigation of complaints. Further, s 323K(2A) provides that the administrator may undertake investigations into past practices of the C&G Division and its branches. These provisions are inconsistent with Parliament proceeding on the basis that the allegations with respect to the C&G Division are true: there would be no need for the administrator to investigate any complaints or past conduct if that were the case.

210 *YBFZ* (2024) 99 ALJR 1 at 12 [18]; 419 ALR 457 at 468. See also *NZYQ* (2023) 97 ALJR 1005 at 1017 [52]; 415 ALR 254 at 267.

211 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 536. See also *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 70.

212 See [110] above.

213 See [126]-[128] above.

No executive punishment

157 In relation to the allegation of *executive* punishment, the detriment imposed by s 323K cannot be characterised as for a punitive purpose. As submitted by the Commonwealth defendants, the mere fact of an interference with the control of property does not itself make the law *prima facie* punitive. In *Duncan v New South Wales*, the Court determined that the mere legislative deprivation of valuable assets did not equate to punishment in the sense relevant to judicial power.²¹⁴ The same logic extends to executive deprivation of property. Under Pt 2A, control of property is vested in the administrator for a temporary period for a protective purpose. Insofar as s 323K causes any detriment to an officer who can no longer control the property of the C&G Division, that does not reflect a punishment for an adjudgment of guilt.

Conclusion

158 For those reasons, ss 323B and 323K are not punitive. No question of justification arises. The answer to Question 4 is "No".

Questions 5 and 6: s 51(xxxi) of the *Constitution*

159 The plaintiffs further submitted that each of s 323K(1)²¹⁵ and s 323M²¹⁶ of the FWRO Act was invalid because it authorised and effected an "acquisition of property" for the purposes of s 51(xxxi) which did not comply with the "just terms" requirement.

160 The short and complete answer to the plaintiffs' reliance on s 51(xxxi) is that, even if ss 323K(1) and 323M(1) and (2) of the FWRO Act are laws with respect to an "acquisition of property" within the meaning of s 51(xxxi) of the *Constitution* (which is unnecessary to decide), "just terms" are provided by s 323S of the FWRO Act.²¹⁷

214 (2015) 255 CLR 388 at 409 [46].

215 See [76] above.

216 See [78] above.

217 See *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 229-230 [41]-[42]; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 365-366 [108], 389-390 [195]-[197], 429 [324], 469-471 [461]-[466].

161 Section 323S is a shipwrecks clause.²¹⁸ Section 323S(1), headed "Compensation for acquisition of property", provides:

"If the *operation of this Part*, or an instrument made under this Part, would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) *from a person* otherwise than on just terms (within the meaning of that paragraph), the Commonwealth is liable to pay a reasonable amount of compensation to *the person*." (emphasis added)

A "person" in s 323S(1) includes a body corporate.²¹⁹

162 In the present case, the relevant "person" in s 323S(1) is the CFMEU. The CFMEU, as an "organisation" within the meaning of s 6 of the FWRO Act, is a body corporate²²⁰ and has "power to purchase, take on lease, hold, sell, lease, mortgage, exchange and otherwise own, possess and deal with, any real or personal property".²²¹ The C&G Division of the CFMEU is not a "person": it is not a body corporate and it does not otherwise have legal personality separate from the CFMEU. It cannot itself hold or be deprived of any property.

Section 323K – Question 5

163 Section 323K(1)(a) of the FWRO Act states that "[w]hile the [C&G] Division and its branches are under administration, the administrator ... has control of the property ... of the Division and its branches". However, as we have seen, the CFMEU is the legal entity that holds the property and therefore is the entity to be deprived of control of the property. The C&G Division is not a separate legal entity. Any "property" affected by s 323K(1) is the property of the CFMEU.

164 The content of the CFMEU Rules and the C&G Division Rules reflects and reinforces those facts.²²² Even if s 323K(1) effected an acquisition of property, the acquisition would be from the CFMEU. It is therefore the CFMEU, not the C&G Division, that would be the "person" entitled to compensation under s 323S(1).

218 *Northern Territory v Griffiths* (2019) 269 CLR 1 at 44-45 [49], citing, by way of example, *Cunningham v The Commonwealth* (2016) 259 CLR 536 at 552 [29].

219 AIA, ss 2 and 2C.

220 FWRO Act, s 27(a).

221 FWRO Act, s 27(c).

222 See [83]-[87] above.

165 The plaintiffs' submission that any compensation paid under s 323S of the FWRO Act would necessarily be returned to the Administrator's control is rejected. Section 323K(1)(a) provides that, while the C&G Division and its branches are under administration, the administrator has control of "the property ... of the Division and its branches". The phrase "property ... of the Division" would not be construed as extending to compensation that would be paid by the Commonwealth to the CFMEU under s 323S.²²³ There is no basis within the CFMEU Rules, or elsewhere, for the assertion that any compensation received by the CFMEU under s 323S would be received by the C&G Division, as opposed to another part of the CFMEU that may be responsible for claiming any compensation, such as the National Office.

166 Question 5 should be answered "No". Given that answer, the plaintiffs' submission that any taking of control of property is an acquisition within the meaning of s 51(xxxi) does not need to be addressed.²²⁴ Even if there was an acquisition of property from the CFMEU, the plaintiffs are not the CFMEU and they sought no other form of relief.

Section 323M – Question 6

167 Section 323M provides that "[t]he administrator is entitled to receive remuneration for necessary work properly performed by the administrator in relation to the administration",²²⁵ *"from the funds of the CFMEU"*.²²⁶ It does not state that the remuneration is to be paid from the funds of the C&G Division. And, as the plaintiffs rightly conceded, if the funds that pay the Administrator's remuneration do not come from the C&G Division, the plaintiffs' claim in relation to s 323M must fail. In any event, s 323S again provides a complete answer. Question 6 should be answered "No".

Conclusion and answers

168 The questions of law stated by the parties should be answered in the terms set out in [71] above.

223 AIA, s 15A.

224 See fn 156 above.

225 FWRO Act, s 323M(1).

226 FWRO Act, s 323M(2) (emphasis added).

EDELMAN J.

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I. Introduction

The Construction, Forestry and Maritime Employees Union ("the CFMEU") had 126,063 members as at 31 December 2023 (with each member

permitted to belong to only one of its three divisions²²⁷). Since 2019, there have been 1,163 occasions on which the CFMEU and its officers have been found to have breached various industrial laws.²²⁸ The CFMEU and its officers have incurred more than \$10 million in penalties. Between July and August 2024, news articles were published in print and online media concerning officers of the CFMEU and one of its divisions, the Construction and General Division ("the C&G Division"). The articles alleged intimidation, assault, and corruption. Between one and nine officers of each of the six State and Territory governing bodies of the C&G Division, as well as officers of the C&G Divisional Executive, have been found to have engaged in contraventions.

170 On 23 August 2024, the same day that legislative amendments enacted by the Commonwealth Parliament came into effect ("the Legislative Amendments"),²²⁹ the Commonwealth Executive determined a scheme under the provisions inserted by the Legislative Amendments placing the C&G Division of the CFMEU into administration ("the Determination").²³⁰ This special case is brought by two plaintiffs who held various offices in the C&G Division of the CFMEU which were vacated by the scheme of administration. The plaintiffs challenge the constitutional validity of the Legislative Amendments and, therefore, the statutory authority for the Determination. The questions in the special case condense to essentially four substantive questions:

- (1) Are the Legislative Amendments supported by a constitutional head of power?
- (2) Does the implied freedom of political communication:
 - (i) preclude legislative power for the Legislative Amendments, with the effect that
 - (ii) the Determination is invalid?

227 Rules of the Construction, Forestry and Maritime Employees Union ("CFMEU Rules"), r 7(iv).

228 *Workplace Relations Act 1996* (Cth), *Fair Work Act 2009* (Cth), *Building and Construction Industry (Improving Productivity) Act 2016* (Cth), and *Building and Construction Industry Improvement Act 2005* (Cth).

229 *Fair Work (Registered Organisations) Amendment (Administration) Act 2024* (Cth).

230 *Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024* (Cth).

61.

- (3) Are the Legislative Amendments contrary to Ch III of the *Constitution*?
- (4) Do the Legislative Amendments effect an acquisition of property other than on just terms contrary to s 51(xxxi) of the *Constitution*?

171 The answer to the first question is "yes" and the answer to each of the second, third, and fourth questions is "no". Each of these questions is considered separately below. But central to all of them is a consideration of the role of legislative purpose and the terms and purpose of the Legislative Amendments. Some members of this Court take different approaches in this case to the role of legislative purpose in relation to the implied freedom of political communication in the *Constitution*. The reason for this may be the different weight placed by different members of this Court upon precedent and its various dimensions.

II. The role of legislative purpose

(i) *Discerning the purposes of a legislative provision*

172 Parliament, being the combined operation of the two Houses of Parliament and the King (as represented by the Governor-General),²³¹ does not have thoughts. Nor are the thoughts of individual members of Parliament attributed to Parliament. Yet, for centuries the courts have referred to the purpose and intention of Parliament in enacting laws. The reason for this is that Parliament is used as a construct to reflect our techniques of understanding ordinary verbal communication. If the words of general legislation are to speak to, and be understood by, the population at large then they must be capable of being interpreted by the same techniques of understanding ordinary verbal communication. The meaning of verbal communication in everyday life involves identifying an assumed purpose of the speaker or writer and ascertaining the context in which the speaker or writer uses particular words. The same technique is reflected in the ordinary processes of legislative interpretation, which rely upon a notional intention and purpose of the construct of Parliament. The statutory and common law rules of interpretation have developed to allow recourse to a very wide range of materials to determine the intention and purpose of Parliament.²³²

²³¹ *Constitution*, s 1.

²³² *Harvey v Minister for Primary Industry and Resources* (2024) 278 CLR 116 at 157-162 [106]-[116].

173 The identification of legislative purpose uses ordinary language processes of interpretation²³³ with the focus upon identifying the purpose at the right level of generality based upon the mischief to which the provision is directed.²³⁴ Consistent with ordinary verbal communication, there is a difference between each of: (i) the purpose of legislation, expressed at the right level of generality; (ii) the motive that any member of Parliament might have for supporting legislation with that purpose; (iii) the means used to achieve that purpose; and (iv) the foreseeable or actual effect of the legislation enacted for that purpose.²³⁵ Legislative purpose is thus the ultimate goal or end to be achieved, distinct from the "political motives"²³⁶ or reasons for pursuing that purpose, the means used to achieve that purpose, or the foreseeable or actual effect of the legislation.²³⁷

174 A helpful example given by Nettle J in *Clubb v Edwards*²³⁸ is legislation that restricts the availability of classified information. The means used might be criminal sanctions for any communication of that information. The restrictions on the classified information might have foreseeable and actual effects of restricting political debate about national defence. And there may even be members of Parliament whose motive in supporting the proposed legislation included a desire to suppress political speech on the topic of national security. But the purpose of

233 *Ruddick v The Commonwealth* (2022) 275 CLR 333 at 384 [133], quoting *Unions NSW v New South Wales* ("Unions No 2") (2019) 264 CLR 595 at 657 [171]; *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 425 [242], see also at 382 [114].

234 *Unions No 2* (2019) 264 CLR 595 at 657 [171]; *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 71 [183], 79 [204]; *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1015 [40]; 415 ALR 254 at 264-265.

235 See *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at 573 [18]; *McCloy v New South Wales* (2015) 257 CLR 178 at 205 [40]; *Brown v Tasmania* (2017) 261 CLR 328 at 432-433 [322], quoting *Tajjour v New South Wales* (2014) 254 CLR 508 at 584 [163]; *Unions No 2* (2019) 264 CLR 595 at 656-657 [170]; *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at 254 [83], quoting *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 561 [12].

236 *Monis v The Queen* (2013) 249 CLR 92 at 163 [184].

237 *Automotive Invest Pty Ltd v Federal Commissioner of Taxation* (2024) 98 ALJR 1245 at 1265-1266 [109]-[115]; 419 ALR 324 at 351-353.

238 (2019) 267 CLR 171 at 281 [309].

the legislation is not to burden the freedom of political communication: it is to ensure the security of the country.

(ii) *The use of private correspondence to discern legislative purpose*

175 The Solicitor-General of the Commonwealth correctly submitted that to the extent that private correspondence is not in the public domain at the time of the enactment of legislation, that correspondence, even if it relates to the passage of the legislation, has extremely limited utility as extrinsic material in ascertaining the legislation's purpose. One instance of such limited utility was given by French CJ and Gummow J in *Wong v The Commonwealth*,²³⁹ where their Honours referred to the use of such private materials (which were not in the public domain at the time a provision was passed by Parliament) in order to understand the contemporary (and ascertainable) public usage of a phrase at that time. In this very limited way, the existence or content of private materials that are not available to members of the public might be used by courts merely as evidence of matters that are widely known to the public.

176 On the other hand, also in *Wong v The Commonwealth*,²⁴⁰ Hayne, Crennan and Kiefel JJ suggested that private materials might be used to "disclose the issue" to which the provision was directed. Their Honours should not be taken to have been suggesting that the utility of private materials could be extended beyond the limited use recognised by French CJ and Gummow J. If the legal meaning of a statutory provision were altered due to matters in private material that are not known to the general public at the time the provision is enacted, and perhaps for many years subsequently if the material remains private, then that legal meaning might be unascertainable by any member of the public other than the parties to the private material.²⁴¹ Such a conclusion is anathema to the transparency required in any society ordered by law. And it would turn upon their head the fundamental principles of public intelligibility that motivate the interpretation of legislation.

(iii) *No judicial power to disregard an unconstitutional purpose*

177 The plaintiffs submitted that the purpose of the Legislative Amendments is to impose legislative or executive punishment and also that the purpose is to burden the freedom of political communication. If the plaintiffs were correct in those submissions then this Court would have no judicial power to uphold the constitutional validity of the Legislative Amendments on the basis that some other, additional, valid purpose could be found. In the extremely rare circumstances

239 (2009) 236 CLR 573 at 591 [52].

240 (2009) 236 CLR 573 at 625 [185].

241 Gageler, "Legislative Intention" (2015) 41 *Monash University Law Review* 1 at 5.

where the very goal or aim of Parliament is to legislate contrary to the *Constitution*, it is the judicial duty to uphold the *Constitution*.

178 The reason that circumstances will be extremely rare in which a Parliament will be found to have a purpose (design, object, or aim) of acting contrary to an express or implied requirement of the *Constitution* lies in the difference between purposes, on the one hand, and motives, means, or foreseeable effects, on the other. It is never sufficient to invalidate a law merely to demonstrate that one of the motives of members of Parliament was to burden the freedom of political communication, or that the means used by the law or the foreseeable effects of the law would burden that freedom. It is true that, in one sense, a means chosen to achieve an ultimate purpose might be described as an intermediate purpose.²⁴² But, as explained above, the relevant legislative purposes for a law are only the ultimate goals of the law, not the means by which those goals are achieved.

179 It would be surprising if hypothetical legislation containing a single law enacted "For the Purposes of Impairing Free Political Communication and Other Purposes" could be consistent with the implied freedom of political communication. Indeed, as explained later in these reasons, the essence of the test for justification of a law that has the *effect* of burdening freedom of political communication requires consideration of the proportionality of the means used by the law to achieve a legitimate purpose. The consideration of whether a law is justified is not concerned with whether a *purpose* that is contrary to the *Constitution* can be justified by reference to other purposes that are consistent with the *Constitution*. Nor does the consideration of whether a law is justified involve asking whether the means used to achieve the purposes of the law are proportionate to some, but not all, of the law's purposes. Indeed, as explained below, to ignore or remove one of a law's purposes may give the law a different meaning and therefore a different effect.

(iv) *No judicial power to amend the purposes of legislative provisions*

180 During the oral argument of this special case, an issue was raised with senior counsel for the plaintiffs as to whether it is a legitimate technique of judicial interpretation or application to "read down" the purposes of a statutory provision, or even the purposes of an entire statute, if the provision or legislation were found to have an illegitimate purpose. Senior counsel for the plaintiffs correctly submitted that this "simply cannot be done". No other party made any submission in favour of a change of such enormity to permit "reading down" to remove statutory purposes or "reading up" to insert new statutory purposes. They were right not to do so. Such a reallocation of power would involve courts crossing the

242 *Automotive Invest Pty Ltd v Federal Commissioner of Taxation* (2024) 98 ALJR 1245 at 1265 [110]; 419 ALR 324 at 351, referring to Finnis, *Intention and Identity: Collected Essays Volume II* (2011) at 153.

Rubicon between adjudicating and legislating, and marching upon the power of Parliament.

181 The limits of judicial power in cases concerning the interpretation of Commonwealth legislation are marked out by saving provisions such as s 15A of the *Acts Interpretation Act 1901* (Cth), which effectively provides that every Act shall be "read and construed" (that is, interpreted and applied) as subject to the *Constitution*. But the court's function remains "to construe the statute in the light of s 15A, not to assume the role of legislator and to re-enact a law within power".²⁴³ As Rich, Starke and Dixon JJ said nearly a century ago: "s 15A cannot apply to divert legislation from one purpose to another".²⁴⁴ That fundamental principle has not changed.

182 Section 15A has been used in three ways to preserve the validity of a statutory provision that would otherwise be contrary to the *Constitution*. These three techniques, although overlapping language is sometimes (confusingly) used to describe them, are distinct. The three techniques, with different labels, are: (i) reading "down" (or reading "up"²⁴⁵) the meaning of a statutory provision where alternative interpretations are reasonably open; (ii) notional severance of statutory words to alter the meaning or application of a statutory provision; and (iii) partial disapplication of the application of a statutory provision.²⁴⁶

183 Some legislation, such as the *Fair Work Act 2009* (Cth), gives primacy to the technique, subject to a contrary intention,²⁴⁷ of partially disapplying the legislation in its invalid applications.²⁴⁸ The other techniques can involve changes to statutory meaning. But none of the three legitimate methods of using saving provisions such as s 15A of the *Acts Interpretation Act* permit a court to amend or alter the purpose of the provision. None of the three methods can be used if the resulting interpretation or application of the provision would result in the provision having a "different policy".²⁴⁹ That would be the effect of changing the purposes

243 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 61.

244 *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 386.

245 *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 at 547-548 [36]-[37]; *Clubb v Edwards* (2019) 267 CLR 171 at 314 [417].

246 *Clubb v Edwards* (2019) 267 CLR 171 at 319-322 [426]-[433].

247 *Fair Work Act*, s 38(3).

248 *Fair Work Act*, s 38. See also *Migration Act 1958* (Cth), s 3A(1).

249 *Pidoto v Victoria* (1943) 68 CLR 87 at 110-111.

of the provision by the removal or addition of a purpose. If the expression "reading down" were used to describe the removal of a legislative purpose, it would be a euphemism. The purpose would not be "read" at all. It would be removed.

184 These techniques of interpretation and application of legislation mark out the limits of judicial power to preserve validity. The limits of judicial power are therefore reached at the point of identification of Parliament's purpose. Like almost all other communication, the purpose of a legislative utterance informs how that utterance should be understood. Altering the purpose of a legislative provision has the effect of amending the manner in which that provision will be interpreted. That is why it has been said many times in this Court that the text of legislation must be considered at the same time as legislative context and purpose.²⁵⁰ That is why Dixon CJ said that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed".²⁵¹ That is why the limit to the interpretative duty in s 3(1) of the *Human Rights Act 1998* (UK)—to "read and give[] effect [to]" (interpret and apply) legislation consistently with Convention rights "[s]o far as it is possible to do so"—is reached when the interpretation or application would not "go with the grain of the legislation"²⁵² or would be inconsistent with the "underlying thrust of the legislation".²⁵³ It is also why s 6 of the *New Zealand Bill of Rights Act 1990* (NZ) only permits a statutory enactment to be given "a meaning that is consistent with the rights and freedoms" therein if the meaning gives effect to, and does not stultify, the statutory purpose.²⁵⁴

185 It would not merely be an arrogation of legislative power to this Court for the Court to amend a legislative purpose. It would require this Court to revisit large swathes of its jurisprudence. For instance, if Commonwealth legislation were

250 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 368 [14]; *SAS Trustee Corporation v Miles* (2018) 265 CLR 137 at 149 [20], 157 [41], 162-163 [64]; *AB (a pseudonym) v Independent Broad-based Anti-corruption Commission* (2024) 278 CLR 300 at 312 [21]; *Pafburn Pty Ltd v The Owners – Strata Plan No 84674* (2024) 99 ALJR 148 at 163-164 [71]; 421 ALR 133 at 151-152, citing *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47].

251 *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397.

252 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 601 [121].

253 *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264 at 303-304 [28].

254 *Fitzgerald v The Queen* [2021] 1 NZLR 551 at 623 [220]. See also *B v Auckland District Law Society* [2003] 2 AC 736 at 759-760 [59].

invalid because it had a punitive purpose,²⁵⁵ or was deemed to have a punitive purpose,²⁵⁶ contrary to Ch III of the *Constitution*, then that legislation could be revived by judicially removing the punitive purpose to create a new law based on any other, non-punitive purpose. Or legislation that was invalid because it had the purpose of discriminating against interstate trade or commerce,²⁵⁷ contrary to s 92 of the *Constitution*, could be revived by judicial sculpting of Parliament's purpose to create a new law that would be interpreted and applied without Parliament's discriminatory purpose.

III. The Legislative Amendments and their purpose

(i) *The Legislative Amendments*

186 The Legislative Amendments—which, together with the Determination, gave effect to the administration of the C&G Division of the CFMEU—were contained in the *Fair Work (Registered Organisations) Amendment (Administration) Act 2024* (Cth) ("the Administration Act"). The Administration Act inserted: (i) Pt 2A into Ch 11 of the *Fair Work (Registered Organisations) Act 2009* (Cth) ("the FWRO Act"); and (ii) s 177A into the *Fair Work Act*. Related provisions were also inserted in the FWRO Act and the *Fair Work Act*.

187 One difficulty in interpreting the Legislative Amendments, in their focus upon the administration of the C&G Division, is that although the CFMEU is a body corporate,²⁵⁸ the C&G Division is not a separate legal entity. The C&G Division is a collection of members who are bound together contractually²⁵⁹ by the

255 *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 368-369 [75], 370 [80], 371 [82], 375 [95], 398 [163]; *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899 at 908 [26]-[27], 910 [41], 911 [45]-[46], 912 [50], 912-913 [53], 917-918 [76]-[77]; 415 ALR 1 at 8, 11-12, 12-13, 14, 14-15, 21. See also *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 154-159 [196]-[204].

256 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005; 415 ALR 254; *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1; 419 ALR 457.

257 *Cole v Whitfield* (1988) 165 CLR 360 at 409; *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 at 269 [51]; *Palmer v Western Australia* (2021) 272 CLR 505 at 598 [265], 599 [269].

258 FWRO Act, s 27.

259 See *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Q)* (1995) 184 CLR 620 at 639; *Koc v Diamond [No 2]* [2022] FCA 640 at [28]; *Construction, Forestry, Maritime, Mining and Energy Union v Quirk* (2023) 300 FCR 170 at 212 [161].

registered rules governing the internal management of the CFMEU and the C&G Division, those rules being enforceable by order of the Federal Court of Australia under s 164 of the FWRO Act. Assets to which title is held by the CFMEU, but which are held by the rules for the benefit of the C&G Division,²⁶⁰ are held on trust by the CFMEU for the members of the C&G Division as they exist from time to time.²⁶¹ Officers of the C&G Division who deal with those assets under the Rules of the CFMEU Construction and General Division and Construction and General Divisional Branches ("the C&G Division Rules")²⁶² do so with the duties of a trustee, or, perhaps more accurately, the duties of the holder of a trust power.²⁶³ The Legislative Amendments operate upon this legal structure, although they treat the C&G Division as though it were a legal entity for the purposes of administration.

188 The centrepiece of the new Pt 2A of Ch 11 of the FWRO Act is Div 1, which, by s 323A, places the C&G Division of the CFMEU under administration for five years from the time that the Minister for Employment and Workplace Relations ("the Minister") determines a scheme under s 323B and an administrator is appointed under s 323C. The Minister is required by s 323D to vary or revoke the scheme upon request by the administrator in certain circumstances.

189 Section 323B in Pt 2A of Ch 11 of the FWRO Act empowers the Minister, in writing, to determine a scheme for the administration of the C&G Division of the CFMEU and its branches "if the Minister is satisfied that, having regard to the Parliament's intention in enacting this Act (see section 5), it is in the public interest for the [C&G] Division and its branches to be placed under administration".

190 The new s 177A of the *Fair Work Act* restricts various people, described as "removed persons", from being bargaining representatives in various circumstances arising from the determination of a scheme under s 323B of the FWRO Act. One set of relevant circumstances includes where the person has been removed or suspended as an officer of the C&G Division, or as a workplace delegate for members of the C&G Division, or where their employment with the CFMEU or the C&G Division has been suspended or terminated, as a result of a

260 CFMEU Rules, rr 4(w), 23(vi), 27(iii); Rules of the CFMEU Construction and General Division and Construction and General Divisional Branches, rr 14, 35(a), 40(4)(a).

261 *Re Horley Town Football Club* [2006] WTLR 1817 at 1843 [118]. See also at 1820 [5].

262 C&G Division Rules, r 13(ii), (vi). See also r 9(15).

263 Heydon and Leeming, *Jacobs' Law of Trusts in Australia*, 8th ed (2016) at 325 [16.06].

scheme determined under s 323B(1) of the FWRO Act. Another set of relevant circumstances includes where a person voluntarily ceases to be such an officer or workplace delegate, or to be employed by the CFMEU or the C&G Division, and where the administrator forms the opinion that, if the person had not ceased in their relevant role, the administrator would have taken action under the scheme to ensure they did not continue in that role.

(ii) *The purpose of the Legislative Amendments*

191 The plaintiffs relied upon various extrinsic materials to assert that the Legislative Amendments had a purpose of burdening the freedom of political communication. Some of the materials upon which the plaintiffs relied were not in the public domain. For instance, the plaintiffs relied upon a letter from the Minister to Senator Cash (the then Deputy Leader of the Opposition in the Senate) dated 14 August 2024. In that letter the Minister set out several features of the scheme of administration contemplated in the Bill to which the Government was giving consideration and the Minister said that the Government would engage in targeted consultation, including with the Coalition, "[b]efore making a decision in relation to any such scheme".

192 The plaintiffs also relied upon a letter from the proposed administrator ("the Administrator") to the Minister dated 19 August 2024 in which the Administrator expressed his intention, in the event of his appointment, to vary the C&G Division Rules to prohibit the making of party-political donations or the funding of party-political campaigns.

193 For the reasons above, the plaintiffs' attempt to rely upon these private materials in ascertaining the purpose of Pt 2A and s 177A should be firmly rejected. Absent valid statutory authority, there is no place in a society ordered by law for a court to interpret laws by reference to communications concealed from, or unknown to, the general public. On the other hand, as the plaintiffs rightly pointed out, some of the information in the above letters came into the public domain before the Legislative Amendments were passed. In that form, the public information can inform the purpose of legislation.

194 The background to the Legislative Amendments is that the *Fair Work (Registered Organisations) Amendment (Administration) Bill 2024* (Cth) was introduced in the Senate on 12 August 2024. Debate in the Senate commenced the following day. On 15 August 2024, reference was made to the Minister's letter in that chamber. The Minister said:

"We have already agreed in a letter to Senator Cash ... that the scheme of administration that would be applied under this legislation would ban donations to any political party for the period of the administration. We've already agreed to that. It's in a letter to Senator Cash saying it will be in the scheme of administration, which is part of the legislation."

The Senate failed to agree to the Bill that day. A second stage of debate commenced thereafter, and the Senate ultimately passed the Bill on 19 August 2024.

195 On 19 August 2024, at a press conference, Senator Cash said the following about the Administrator's letter:

"I have been provided with a copy of a letter from the administrator to the Minister, Murray Watt, which clearly sets out the administrator's goals, and one of those very clear goals is to ensure that the CFMEU, in administration is not to incur any form of political campaign expenditure or make party political donations and I am prepared to accept that."

196 On 20 August 2024, during debate of the Bill in the House of Representatives, the then Manager of Opposition Business in the House, Mr Fletcher, advised that the Administrator had "set out in writing the guiding principles and goals he determined before accepting the role". Select passages from the Administrator's letter were read verbatim including a passage expressing the Administrator's intention "to vary the rules of the [C&G Division] to prohibit the making of party political donations or the funding of party political campaigns". The Bill passed the House of Representatives that day and received Royal Assent on 22 August 2024.

197 These public materials might illuminate the motives of some of those who supported the Legislative Amendments. They might provide some insight into the means used to achieve passage of the Legislative Amendments. And they might reveal foreseeable effects of the Legislative Amendments. For instance, the public materials suggest that some, perhaps many, of those members of Parliament who supported the Legislative Amendments had the motive that the legislation would not be applied by the Administrator to make political donations or incur political campaign expenditure with any CFMEU or C&G Division funds. The public materials also suggest an understanding that the means by which any legislative purpose was expected to be achieved, and therefore a foreseeable effect of the Legislative Amendments, included that the Administrator would vary the C&G Division Rules so as to prevent the making of political donations, or the incurring of political campaign expenditure, with any CFMEU or C&G Division funds.

198 Another foreseeable effect of the Legislative Amendments in Pt 2A of Ch 11 of the FWRO Act and s 177A of the *Fair Work Act* was to burden the freedom of political communication. But, as has been explained in considerable detail above, the purpose of legislation is distinct from each of these motives, means, and foreseeable effects. The purpose, or purposes, of the Legislative Amendments that inserted the new Pt 2A of Ch 11 of the FWRO Act and the new s 177A of the *Fair Work Act* are the end or ends that those provisions are ultimately intended to achieve. The purpose must be assessed by reference to the intrinsic and extrinsic statutory context of the provisions. An important aspect of intrinsic

statutory context is the expressed objects of the FWRO Act and the *Fair Work Act*, because the new provisions inserted in those Acts were intended to form a part of those Acts, with each Act intended to operate as a unitary whole.²⁶⁴ In this way, "both the Act which is amended and the amending Act are to be read together as a combined statement of the will of the legislature".²⁶⁵

199 As to Pt 2A of Ch 11 of the FWRO Act, s 5 provides for "Parliament's intention in enacting this Act". The section sets out Parliament's intention, matters that Parliament had considered, and issues that Parliament had recognised and respected. None of those matters remotely suggested any intention to burden the freedom of political communication. At a high level of generality, the enunciated object of Parliament in enacting the FWRO Act was "to enhance relations within workplaces between federal system employers and federal system employees and to reduce the adverse effects of industrial disputation".²⁶⁶ At a level of greater particularity, the objects of the FWRO Act included the provision of standards that would ensure that registered employer and employee organisations "are representative of and accountable to their members, and are able to operate effectively"²⁶⁷ and "encourage the efficient management of organisations and high standards of accountability of organisations to their members".²⁶⁸ Parliament's stated purpose of achieving efficiency and accountability are reflected throughout Pt 2A. For instance, the Minister is required to have regard to the legislated statement of Parliament's intention in the determination,²⁶⁹ variation,²⁷⁰ or revocation²⁷¹ of a scheme of administration.

200 The general accountability and efficiency purpose of the FWRO Act supports the particular purpose of Pt 2A being expressed in the following terms, adapted from the formulation contended for by the Commonwealth and the Attorney-General of the Commonwealth in submissions to this Court:

264 *Acts Interpretation Act*, s 11B(1).

265 *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 463.

266 FWRO Act, s 5(1).

267 FWRO Act, s 5(3)(a).

268 FWRO Act, s 5(3)(c).

269 FWRO Act, s 323B(1).

270 FWRO Act, s 323D(1)(b).

271 FWRO Act, s 323D(1A)(b).

To enable the C&G Division to be returned to lawful operation in its members' interests in an effective, efficient, and accountable manner.

That particular purpose is also supported by the emphasis on effective workplace relations, efficiency, and accountability in the Revised Explanatory Memorandum to the Bill introducing the Legislative Amendments.²⁷²

201 As to s 177A of the *Fair Work Act*, it reflects that same purpose in the prohibition upon removed persons from being bargaining representatives in various circumstances after the determination of a scheme under s 323B of the FWRO Act. This shared purpose is not merely a product of s 177A being part of the package of the Legislative Amendments. It is also reflected in the objects of the *Fair Work Act* in s 3, which include "recognising the right to freedom of association and the right to be represented ... providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms".²⁷³

IV. A constitutional head of power

(i) *The test for whether a law is supported by a constitutional head of power*

202 A usual approach to addressing a submission that a law is not supported by a constitutional head of power is to ask whether the law is "with respect to" a constitutional head of power enumerated in s 51. That usual approach focuses upon whether the law: (i) in its terms, "operates directly on the subject of the power"²⁷⁴ (in terms of the duties, liabilities, or other legal relations created²⁷⁵) or, if not, (ii) has "in its practical operation [that is, effect] a substantial or sufficient connexion with the relevant head of power".²⁷⁶ A law that operates in the former

272 Australia, House of Representatives, *Fair Work (Registered Organisations) Amendment (Administration) Bill 2024*, Revised Explanatory Memorandum at 1-2 [2], 2 [4], [6], 3 [8], 4 [11], 6-7 [23], 9 [39], 18 [36], 24 [82]. See also Australia, House of Representatives, *Parliamentary Debates* (Hansard), 20 August 2024 at 5831-5832.

273 *Fair Work Act*, s 3(e).

274 *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 205. See also at 184.

275 See *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 7, 16; *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 201-202.

276 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 294. See also *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 187.

manner has sometimes been described as one where the subject matter of the law is at the "core" of the power and a law that operates in the latter manner has sometimes been described as one where the subject matter of the law is peripheral, or incidental, to the power.²⁷⁷

203 The metaphors of the core and periphery of a head of power are "not always helpful".²⁷⁸ The core and peripheral aspects of a power are part of a single grant of power.²⁷⁹ And it is difficult to see any justification for "different tests of validity" of a law by reference only to the metaphors of whether the subject matter of the law is thought to lie within the core or at the periphery of the power.²⁸⁰ Nevertheless, the core and periphery of a head of power are relevant once it is recognised that a law can be connected with the subject matter of a power (with the subject matter of the power to be construed with all the generality that the words permit²⁸¹) by either: (i) the legal relations that the law creates (including rights, duties, powers, and liabilities²⁸²), or (ii) the practical effect (practical operation) of the law. The metaphors of the "core" and "periphery" of a power describe the extent or directness of the association between the subject matter or purpose of a head of power, on the one hand, and the legal relations created by a law or its practical effect, on the other. This is what is meant by statements that "[t]he practical as well as the legal operation of the law must be examined".²⁸³

277 Zines, "Characterisation of Commonwealth Laws", in Lee and Winterton (eds), *Australian Constitutional Perspectives* (1992) 33 at 42; Stellios, *Zines and Stellios's The High Court and the Constitution*, 7th ed (2022) at 38.

278 *Spence v Queensland* (2019) 268 CLR 355 at 406 [59].

279 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 375; *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 40 [155]; 419 ALR 457 at 505-506.

280 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 321; *Spence v Queensland* (2019) 268 CLR 355 at 510 [349].

281 *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16].

282 *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16].

283 *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 103 [142], referring to *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 369 and *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16].

204 The purpose of the law, expressed at the right level of generality, will assist to identify the directness or closeness of the association between the head of power and the law's legal or practical effect.²⁸⁴ Since the purpose of the law is central in characterising its meaning, and therefore its legal and practical effect, an association with a head of power will be more direct, or less peripheral, the more that the purpose of the law is associated with the subject matter or purpose of the power. The identification of the law's purpose does not always conclude the enquiry. As Mason CJ said in *Cunliffe v The Commonwealth*:²⁸⁵

"the test of reasonable proportionality has an important role to play when the validity of a law hinges upon the proposition that it seeks to protect or enhance a subject matter or legitimate end within power. There is a need to ensure that such a law does not unnecessarily or disproportionately regulate matters beyond power under the guise of protecting or enhancing the legitimate end in view."

205 Although Parliament retains a wide latitude in the means employed to achieve its purposes, an association with the subject matter or purpose of a head of power will become less direct, and more peripheral, the more that the means used—the legal or practical effect of the law—are disproportionate to (or not reasonably capable of being seen as necessary for) the purpose of the law that is associated with the head of power.²⁸⁶ And the means used by a law may become more disproportionate to such purpose the more that the law interferes with a

284 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 319; *Spence v Queensland* (2019) 268 CLR 355 at 406-407 [61], 510-511 [349]-[350]; *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 40-41 [157]; 419 ALR 457 at 506-507.

285 (1994) 182 CLR 272 at 297.

286 *Spence v Queensland* (2019) 268 CLR 355 at 407 [62]; *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 39 [150]; 419 ALR 457 at 504, citing *Australian Boot Trade Employés' Federation v Whybrow & Co* (1910) 11 CLR 311 at 338, *R v Sweeney*; *Ex parte Northwest Exports Pty Ltd* (1981) 147 CLR 259 at 275, *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 259-260, 278, *Richardson v Forestry Commission* (1988) 164 CLR 261 at 289, 303, 311-312, 324, 346, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 29, 93-94, 101, *Leask v The Commonwealth* (1996) 187 CLR 579 at 616, 638, and *Kruger v The Commonwealth* (1997) 190 CLR 1 at 110-111.

person's rights, and the more fundamental those rights interfered with are.²⁸⁷ As Marshall CJ famously said in *McCulloch v Maryland*,²⁸⁸ a law will be characterised as within power if its legitimate purpose or end employs "all means which are appropriate, which are plainly adapted to that end".

206 The focus is upon the sufficiency of the connection between the legal and practical effect of the law and the subject matter or purpose that is associated with the head of power. Provided that a sufficient connection is established, it is irrelevant that the law has other purposes—a dual characterisation—and employs other means to achieve those purposes.²⁸⁹ In other words, once such a sufficient connection is established, "the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice".²⁹⁰

(ii) *The Legislative Amendments are supported by the head of power in s 51(xx) of the Constitution*

207 In *New South Wales v The Commonwealth (Work Choices Case)*,²⁹¹ this Court held that Sch 1 of the *Workplace Relations Act 1996* (Cth) was "supported as an exercise of the power with respect to constitutional corporations".²⁹² Just as the law in *Cunliffe v The Commonwealth*²⁹³ was with respect to aliens when its legal effect was to regulate migration agents who commonly provided services to aliens, so too a law was with respect to constitutional corporations when its legal

287 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 41 [158]-[160]; 419 ALR 457 at 507. See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 29-30.

288 (1819) 17 US 316 at 421.

289 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79; *R v Sweeney; Ex parte Northwest Exports Pty Ltd* (1981) 147 CLR 259 at 265, 266-267, 275; *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 192-194; *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595 at 624-625 [27].

290 *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16].

291 (2006) 229 CLR 1.

292 *Work Choices Case* (2006) 229 CLR 1 at 153 [319].

293 (1994) 182 CLR 272 at 294-295, 317, 334, 358, 375, 387, 394.

effect was to regulate organisations who commonly acted for employees in employment relationships with constitutional corporations.²⁹⁴

208 The reasoning in the *Work Choices Case* that the legal effect of Sch 1 of the *Workplace Relations Act* meant that Sch 1 was within the corporations head of power in s 51(xx) of the *Constitution* began with a focus upon the purposes of Sch 1. The joint judgment explained that "the stated intentions of the Parliament in enacting Sch 1" included:²⁹⁵

"enhanc[ing] relations within workplaces of 'federal system employers' and 'federal system employees' and to reduce the adverse effects of industrial disputation by requiring associations of such persons to meet the standards set out in Sch 1 in order to gain the rights and privileges accorded to associations under the new Act and Sch 1 (s 5(1), (2))".

The joint judgment then explained that "[t]he terms 'federal system employer' and 'federal system employee' are defined in ss 18A(2) and 18B(2) respectively in terms which, among other heads of legislative power, fix upon employment by 'a constitutional corporation'".²⁹⁶ In other words, the stated purposes of Sch 1 (as set out above) were closely associated with the head of power in s 51(xx) of the *Constitution*. And, particularly with regard to the wide latitude for Parliament to implement its purposes, the means by which those purposes were achieved were sufficiently proportionate or adapted to those purposes. Schedule 1 involved "set[ting] up a framework" for the purposes to be achieved by "authoris[ing] registered bodies to perform certain functions within that scheme of regulation" and also requiring, "as a condition of registration, that these organisations meet requirements of efficient and democratic conduct of their affairs".²⁹⁷

209 The *Workplace Relations Act* was renamed and Sch 1 was amended, becoming the FWRO Act, with amendments that are not material to this case.²⁹⁸ The purpose of the Legislative Amendments, being Pt 2A of Ch 11 of the FWRO Act and s 177A of the *Fair Work Act*, reflects the purpose of Sch 1 of the *Workplace Relations Act* as considered in the *Work Choices Case*. The focus upon

294 *Work Choices Case* (2006) 229 CLR 1 at 153 [322]. See also, in relation to Pt 16 of the *Workplace Relations Act*, *Work Choices Case* (2006) 229 CLR 1 at 121-122 [198], 148 [293].

295 *Work Choices Case* (2006) 229 CLR 1 at 151 [309].

296 *Work Choices Case* (2006) 229 CLR 1 at 151 [309].

297 *Work Choices Case* (2006) 229 CLR 1 at 153 [322].

298 *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), Sch 1, Sch 22.

enabling the C&G Division to be returned to lawful operation in its members' interests in an effective, efficient, and accountable manner instantiates the purpose of what was formerly Sch 1 of the *Workplace Relations Act* of requiring associations of relevant employees to meet various standards.

210 Contrary to the plaintiffs' submissions, Pt 2A does not "stand[] apart" from the rest of the FWRO Act. It can be accepted that, as the plaintiffs submitted, Pt 2A has paramount force in a number of respects. Part 2A permits a scheme, and anything done under it, to take effect despite anything in the FWRO Act;²⁹⁹ the determination of a scheme cannot be disallowed by a House of the Parliament;³⁰⁰ and the Minister can prescribe the effect of actions taken under the scheme for the purposes of other laws.³⁰¹ Nevertheless, Pt 2A forms an integral part of making effective the purposes of the FWRO Act, which are as closely associated with constitutional corporations within s 51(xx) as the purposes of Sch 1 of the *Workplace Relations Act* considered in the *Work Choices Case*. Further, in implementing those purposes, Pt 2A is integrated with the remainder of the FWRO Act. For instance, Pt 2A applies to the C&G Division of the CFMEU and its branches, and relies upon the Rules of the Construction, Forestry and Maritime Employees Union ("the CFMEU Rules") (which create the association of persons being the C&G Division),³⁰² in circumstances in which the CFMEU itself owes its existence to the FWRO Act³⁰³ and the CFMEU Rules are governed by the FWRO Act.³⁰⁴ The provisions in Pt 2A concerning suspension, termination, or removal of officers³⁰⁵ also expand upon the duties of officers and employees in Ch 9 of the FWRO Act.³⁰⁶

211 The only remaining submission by the plaintiffs that could be taken to suggest that the legal effect of Pt 2A was so disproportionate to its purpose associated with s 51(xx) of the *Constitution* as to render the connection with that head of power insufficient is the submission that Pt 2A is not supported by

299 FWRO Act, ss 323F, 323G.

300 FWRO Act, s 323B(2).

301 FWRO Act, s 323G(2).

302 FWRO Act, s 323A.

303 FWRO Act, ss 6 (definitions of "CFMEU" and "organisation"), 27, Sch 3 cl 1 (definition of "CFMEU").

304 FWRO Act, Ch 5.

305 FWRO Act, s 323B(3)(b), (e), (f).

306 FWRO Act, s 281.

s 51(xx). That submission relied upon the determination of a scheme by the Minister under s 323B requiring the Minister's satisfaction that "it is in the public interest for the [C&G] Division and its branches to be placed under administration".³⁰⁷ But like statutory provisions generally providing for consideration of the public interest, the requirement of the Minister's satisfaction that the scheme be in the public interest is "neither arbitrary nor completely unlimited" but controlled by the subject matter and purpose of the FWRO Act.³⁰⁸ Further, in assessing the public interest, the Minister is expressly required to have regard to the intention of Parliament in enacting the FWRO Act, as outlined in s 5.³⁰⁹ Nothing about the requirement for the Minister to reach a state of satisfaction as to the public interest involves any extreme departure by the terms of s 323B from the purpose of Pt 2A of enabling the C&G Division to be returned to lawful operation in its members' interests in an effective, efficient, and accountable manner.

V. The implied freedom of political communication

(i) *Structured proportionality and its sudden decline*

212 The implied freedom of political communication that was recognised by this Court in *Lange v Australian Broadcasting Corporation*³¹⁰ is a limitation on legislative power which is not absolute. Provided that the "object of the law" is legitimate, and not itself contrary to the implied freedom of political communication, the issue is whether "the law is reasonably appropriate and adapted to achieving that legitimate object or end".³¹¹ In *McCloy v New South Wales*,³¹² four members of this Court explained that this test "requires" a threefold analysis to be undertaken in assessing whether a law infringes the constitutional freedom of political communication. That threefold analysis, as later refined due to some overlap and confusion of expression,³¹³ is as follows. First, "[d]oes the law

307 FWRO Act, s 323B(1).

308 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at 401 [42], quoting *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505.

309 FWRO Act, s 323B(1).

310 (1997) 189 CLR 520 at 560-561.

311 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562.

312 (2015) 257 CLR 178 at 193-194 [2].

313 *Brown v Tasmania* (2017) 261 CLR 328 at 363-364 [104].

effectively burden the freedom in its terms, operation or effect?"³¹⁴ Secondly, and if so, is the purpose of the law "legitimate, in the sense [of being] compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?" Thirdly, if the purpose (or object) of the law is legitimate, "is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?"³¹⁵

213 The first question is posed in binary terms since a law that does not burden the freedom of political communication cannot be invalid on the basis of the implied freedom. But the extent of the burden becomes important when assessing whether the law is reasonably appropriate and adapted. The second question means that a law will be invalid if any purpose of Parliament in enacting the law is illegitimate, in the sense of a purpose (design, object, or aim) to achieve that which the *Constitution* prohibits:³¹⁶ "[t]o be legitimate, a legislative end must itself be compatible" with the *Constitution*.³¹⁷ As explained above, a law will be invalid, without the need for assessment of the proportionality of the legislation at the third stage, if a purpose of the legislation is illegitimate. Indeed, even Dawson J, a critic of the implication of freedom of political communication, found legislation to be contrary to a more confined implication based in ss 7 and 24 of the *Constitution*, and thus invalid, upon concluding that the impugned law was "designed to keep from voters information which is required by them to enable them to exercise an informed choice".³¹⁸

214 In order to avoid confronting whether a law has an illegitimate purpose, in some cases³¹⁹ members of this Court have assumed that an identified legitimate ("compatible") purpose is the only relevant purpose of the law without considering whether that purpose was the actual purpose or whether the law had an additional

314 *McCloy v New South Wales* (2015) 257 CLR 178 at 194 [2].

315 *Brown v Tasmania* (2017) 261 CLR 328 at 363-364 [104]. See also at 375-376 [155]-[156], 416 [277], 478 [481].

316 *Brown v Tasmania* (2017) 261 CLR 328 at 364 [104], 376 [156], 416 [277], 432 [319]-[321]; *Unions No 2* (2019) 264 CLR 595 at 613 [36], 624 [73], 655 [165].

317 *McCloy v New South Wales* (2015) 257 CLR 178 at 231 [130].

318 *Langer v The Commonwealth* (1996) 186 CLR 302 at 325.

319 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 146, 175, 239; *Unions NSW v New South Wales ("Unions No 1")* (2013) 252 CLR 530 at 557 [49]; *Unions No 2* (2019) 264 CLR 595 at 612 [33].

"new and different"³²⁰ purpose. As commentators have astutely observed, there are grave difficulties with an approach to justification of a law based on an assumed legitimate purpose.³²¹ Courts usually adjudicate upon the validity of laws by reference to the actual purpose and effect of the law, not a hypothetical purpose. If the law would be valid based on a hypothetical assumed purpose, then it would not be known whether the law is valid based on its actual purpose. If the law is invalid by reference to the hypothetical assumed purpose, would the actual purpose have been justified if it differed in some respects from the assumed purpose?

215 The third question, described by the joint judgment in *McCloy* as requiring "proportionality testing",³²² had for a decade repeatedly been held by majorities in this Court to require a test of structured proportionality. In a structured proportionality analysis, it is necessary to ask whether a law is: (i) suitable, in the sense that the law (ie the "provision") has "a rational connection to [its] purpose"; (ii) necessary (or, perhaps more appropriately, reasonably capable of being seen as necessary), "in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect"; and (iii) adequate in its balance.³²³ As I explained in *Babet v The Commonwealth*,³²⁴ in many cases over the last decade this threefold test of "structured proportionality", as refined,³²⁵ was treated as part of this Court's precedent in assessing whether a law impermissibly burdens the freedom of political communication. For the reasons explained in *Babet*, and in circumstances in which the parties' and interveners' submissions followed an approach of structured proportionality, that test for invalidity should be applied despite any of its potentially redundant or limited aspects.³²⁶ I have also done so in this case as a matter of both precedent and respect for the submissions that were made, despite my significant reservations about the first (suitability) aspect of structured

320 *Unions No 2* (2019) 264 CLR 595 at 612 [33].

321 See Chordia, *Proportionality in Australian Constitutional Law* (2020) at 175-176. See also Barak, *Proportionality: Constitutional Rights and their Limitations*, trans Kalir (2012) at 529-530; Carter, *Proportionality and Facts in Constitutional Adjudication* (2021) at 23, 32.

322 See *McCloy v New South Wales* (2015) 257 CLR 178 at 195 [2], 213 [68].

323 *McCloy v New South Wales* (2015) 257 CLR 178 at 194-195 [2].

324 [2025] HCA 21 at [176].

325 *Brown v Tasmania* (2017) 261 CLR 328 at 363-364 [104].

326 See *Babet v The Commonwealth* [2025] HCA 21 at [183]-[184].

proportionality and my concern that the role for the third (adequacy in the balance) aspect should be heavily confined.

216 In *Babet*,³²⁷ however, which was heard after this case (although reasons for decision were delivered before these reasons), a majority of this Court rejected structured proportionality as a universal test for proportionality in instances of the implied freedom of political communication, referring to the "flexible application of all or any of the steps" of structured proportionality and saying that the "tool of analysis" of structured proportionality "is by no means necessary in every case".³²⁸ These remarks correctly reflect the fact that structured proportionality is not the proportionality analysis applied in some categories of case where questions of proportionality arise, such as instances involving the expicature derived from ss 7 and 24 of the *Constitution*, or instances concerning the scope of heads of constitutional power, or instances where members of this Court assess the proportionality of a "prima facie punitive" measure by reference to whether the measure is reasonably capable of being seen as necessary for a non-punitive purpose.³²⁹ In that respect, I entirely agree with the remarks.

217 But the remarks adopted by a majority of this Court in *Babet* appear to have gone further and to have suggested, without submissions from any party on the point, that structured proportionality need not be applied even for the impicature (implied freedom of political communication) in respect of which structured proportionality analysis has been consistently and authoritatively recognised as the precedent of this Court.³³⁰ For the reasons that I gave in *Babet*,³³¹ even if the earliest applications of structured proportionality might be understood as having deployed that test as only one option for the analysis of whether a law employed a means that was reasonably appropriate and adapted to advance its legitimate object, the majority view in this Court soon shifted from "seeing structured proportionality as a tool of analysis to applying it as *the* doctrinal test for justification".³³²

327 [2025] HCA 21.

328 *Babet v The Commonwealth* [2025] HCA 21 at [49], [72], [242].

329 Below at [251]-[254].

330 Compare *Constitution*, s 92: *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 at 269 [52]; *Palmer v Western Australia* (2021) 272 CLR 505 at 528-529 [58]-[59], 598 [267].

331 [2025] HCA 21 at [175]-[176].

332 *Stellios, Zines and Stellios's The High Court and the Constitution*, 7th ed (2022) at 647 (emphasis in original). See also *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 72 [101].

218 Despite the approach of a majority of this Court in *Babet*, which treats structured proportionality as only one of the options in a large suite of alternatives, there is presently no majority view as to when structured proportionality should be applied and, if it is not applied, which alternative should be deployed in those cases where a judge chooses not to apply structured proportionality. The effect of the current state of the law is that the continued use of the structured proportionality technique of legal reasoning, which has been consistently employed by majorities of this Court in order to enhance transparency of reasoning and certainty of outcome, will now decrease transparency and increase uncertainty.

219 This is the worst of all worlds. On Mondays, structured proportionality might be applied in its entirety as the test of justification for the implied freedom of political communication. On Tuesdays, structured proportionality might be applied as the test without its first aspect. On Wednesdays, structured proportionality might not be applied at all and the justification of burdens on the implied freedom might be tested by reference to the vague formula of "reasonably appropriate and adapted". On Thursdays, one judge might take Monday's approach, another might take Tuesday's and a third might take Wednesday's. Cases would need to be argued by reference to a number of different tests which might point in different directions. Nobody would know whether or when a judge would choose to apply structured proportionality as the proportionality test. Judicial decisions in such cases would be open to the criticism that teleological reasoning had been deployed to justify an idiosyncratic policy preference.

220 There can be little doubt that different formulations of proportionality can lead to different results and that the different formulations have "high costs to institutional integrity and legitimacy".³³³ Two examples can be given to illustrate how different results might be achieved as a consequence of adopting different tests for whether a law that burdens the freedom of political communication employs means that are reasonably appropriate and adapted to its legitimate purpose.

221 The first example would arise if in some cases a judge chose to apply only one or other of the aspects of structured proportionality. For instance, if only a suitability analysis were applied, and if suitability were to be understood as requiring only a rational connection between the purpose of a law and its meaning or intended effect,³³⁴ then the proportionality enquiry would be redundant. No law would ever fail to be reasonably appropriate and adapted. This is because it is

333 See Douek, "All Out of Proportion: The Ongoing Disagreement about Structured Proportionality in Australia" (2019) 47 *Federal Law Review* 551 at 552. See also at 553, 571.

334 Compare *Babet v The Commonwealth* [2025] HCA 21 at [230], referring to [50], [53].

beyond argument that the identification of a statutory purpose is achieved by the ordinary processes of statutory interpretation.³³⁵ Purpose is identified from the meaning and intended effect of the law. Even in the most extreme case where no purpose can be identified for a law at any level of generality higher than the meaning of its terms,³³⁶ the intended meaning of the law will (by definition) be a rational means of achieving that purpose.

222 To confuse matters further, there might be dispute about whether "suitability" should be given the meaning ascribed to it in *McCloy* or whether it might be given an expanded meaning, conflated with reasonable necessity, that considers any overreach of the means used by the law to achieve its purposes. Nevertheless, if the test for proportionality were limited to an analysis of suitability in the strict sense described in *McCloy*, then judges who had decided cases upon the basis of a lack of reasonable necessity or a lack of adequacy in the balance might have decided those cases differently. The lack of reasonable necessity for the impugned provisions, as Kiefel CJ, Bell and Keane JJ found in *Brown v Tasmania*,³³⁷ would not have been sufficient for their Honours to conclude that all of those provisions were invalid despite the suitability of some of them. Or the lack of the law's adequacy in the balance, as Gageler J and Gleeson J found in *Farm Transparency International Ltd v New South Wales*,³³⁸ would not have been sufficient for their Honours to conclude that the relevant provisions were invalid despite their suitability.

223 The second example would arise if the concepts in each aspect of structured proportionality were replaced by an analysis that avoided asking any of the three questions, or treated the answers to any of those questions as only factors to be considered, in an overall form of instinctive synthesis of all matters thought to affect whether a law is reasonably appropriate and adapted to its purpose. On that view, whether the law is "reasonably necessary" might be one factor to consider but it would not be conclusive. The black box of "reasonably appropriate and

335 *Monis v The Queen* (2013) 249 CLR 92 at 147 [125]; *Unions No 1* (2013) 252 CLR 530 at 557 [50]; *McCloy v New South Wales* (2015) 257 CLR 178 at 212 [67], 232 [132], 261 [232]; *Brown v Tasmania* (2017) 261 CLR 328 at 362 [96], 391-392 [208]-[209], 432 [321]; *Unions No 2* (2019) 264 CLR 595 at 657 [171]; *Clubb v Edwards* (2019) 267 CLR 171 at 260 [257], 328 [457]; *Ruddick v The Commonwealth* (2022) 275 CLR 333 at 384 [133].

336 *Monis v The Queen* (2013) 249 CLR 92 at 133 [73]; *Unions No 1* (2013) 252 CLR 530 at 557-558 [51]-[52]; *Unions No 2* (2019) 264 CLR 595 at 658 [174].

337 (2017) 261 CLR 328 at 373 [146]. See also *Unions No 2* (2019) 264 CLR 595 at 613 [35], 618 [53], 641 [118].

338 (2022) 277 CLR 537 at 567 [82], 624-625 [273].

adapted" could be applied so that in cases where members of this Court find a law not to be reasonably necessary, the law might still be upheld. Conversely, in cases where members of this Court find a law to be reasonably necessary, the law might nevertheless be invalidated.

224 A path forward for a future without structured proportionality, but with the use of reasonable necessity, might provide content to the black box of "reasonably appropriate and adapted" by reference to any asserted obvious and compelling alternative, the strength of which might vary according to the circumstances.³³⁹ That path would not require any focus on "suitability" (as that concept has been traditionally understood) and would reserve questions of "appropriateness" or the balance between political values for only the most extreme cases. On any view, some principle must be enunciated to govern any proportionality analysis. But, at least within particular categories and perhaps across categories, that principle should be consistent.

225 The resolution of these issues will have to await another case. For the present, I remain of the view that, for the implied freedom implicature, it is appropriate to ask whether the law, having a legitimate purpose, burdens the freedom of political communication and, if so, to apply a structured proportionality analysis to test whether the law employs means that are reasonably appropriate and adapted to the legitimate purpose of the law.

(ii) The appropriate level of the analysis: the Legislative Amendments as applied by the Determination

226 The questions in this case concerning the implied freedom of political communication focus, respectively, upon each of (i) the Legislative Amendments and (ii) the Determination, as made by the Attorney-General of the Commonwealth (acting pursuant to authorisation by the Minister to exercise the Minister's powers under s 323B of the FWRO Act³⁴⁰). The first question is concerned with the operation of the *Constitution* directly upon the Legislative Amendments. In oral submissions the Solicitor-General of the Commonwealth commenced with a proper and appropriate concession: "We accept that that statutory limit [regarding the requirement in s 323B(1) of the FWRO Act for the Minister to reach a state of satisfaction as to the public interest] on its own is not sufficient to ensure that in all of the potential operations of Part 2A, there would be compliance with the implied freedom." For instance, the breadth of the power

339 See *Babet v The Commonwealth* [2025] HCA 21 at [186]-[187]. See also Dixon, "Calibrated Proportionality" (2020) 48 *Federal Law Review* 92 at 103-105; Dixon, "A New Australian Constitutionalism? Constitutional Purposes, Proportionality and Process Theory" (2024) 46 *Sydney Law Review* 455 at 474.

340 See *Acts Interpretation Act*, s 34AAB(1).

in s 323B for the Minister to determine a scheme, together with the great latitude afforded to the Minister in determining the content of the scheme, might purport to authorise a scheme that placed limits on political activity or political donations by the C&G Division or any of its officers which did not comply with the implied freedom of political communication.

227 Although the relevant question in this special case appears to ask whether the Legislative Amendments are invalid in any of their applications, the question should not be understood so broadly. In *Palmer v Western Australia*,³⁴¹ Gageler J and I considered that where an open-textured provision is challenged, the appropriate course is to adjudicate upon the relevant application of the provision (here, the Determination) rather than to attempt to adjudicate upon a range of hypothetical circumstances in which the provision might be applied, the universe of such hypothetical circumstances being as wide as the judicial imagination permits: "[i]t is enough to conclude that the provisions can be 'disapplied'" from any invalid application.³⁴² Indeed, the judicial imagination is a notoriously limited thing when compared with the infinite variety and spice of human endeavour. In this case, for instance, the parties did not attempt to canvass the vast range of possible schemes that could be the subject of a determination under s 323B. Only limited examples were given by the plaintiffs, such as the possibility that a scheme could be declared without the Minister being satisfied that the C&G Division is not functioning lawfully or effectively.

228 The plaintiffs properly accepted that it is generally inappropriate for a court to attempt to adjudicate upon all applications of an open-textured provision and that the validity of the Determination in this case "converges" with the constitutional question. But the plaintiffs argued that it was necessary to adjudicate on all applications in this case because partial disapplication in relation to hypothetical s 323B schemes would be impossible given that so much of the activity of the C&G Division is political. That submission should not be accepted. The Determination is a particular application of the power in s 323B of the FWRO Act. The extent of the C&G Division's political activities bears upon the justification of s 323B in its application by the Determination. It is unnecessary to consider how those political activities might affect the justification of s 323B in other applications. If some other application of s 323B arose, by a new determination, and s 323B was invalid in that application then it could be partially disapplied by s 15A of the *Acts Interpretation Act*.

341 (2021) 272 CLR 505 at 547 [123], 581 [227].

342 *Palmer v Western Australia* (2021) 272 CLR 505 at 581 [227].

229 The separate question in this special case concerning the Determination assumes, correctly,³⁴³ that the validity of the Determination depends upon the legislative authority for it. Since there was no suggestion that the Determination fell outside the scope of Pt 2A of Ch 11 of the FWRO Act, the validity of the Determination turns upon the same question: whether Pt 2A is contrary to the implied freedom of political communication. For this reason, evidence of the actual manner in which the Administrator has exercised his powers, upon which Mr Hiscox (an officeholder of the C&G Division who has not been removed from office but who is subject to the direction of the Administrator), intervening, sought to rely in this Court, might be relevant to administrative law issues about whether those exercises were within statutory power but such evidence is not relevant to the questions addressed to this Court.

(iii) The Legislative Amendments and Determination impose a burden on free political communication

230 The Legislative Amendments impose a burden upon the freedom of political communication which can be assessed by reference to dimensions of depth and width. The depth of a burden concerns the intensity or focus of the effect of a law in constraining free political communication. The width of a burden concerns the extent of the conduct which is constrained, including the number of people affected and the time and place where they are affected.³⁴⁴

231 Subject to the two matters of mitigation discussed below, the burden imposed by the Legislative Amendments is both deep and wide. As the special case describes, the C&G Division, through its officers, is heavily involved in politics. In the financial year ended 31 March 2023, the Victoria-Tasmania Divisional Branch of the C&G Division paid \$151,037 in affiliation fees to the Australian Labor Party, and a further \$2,356 in affiliation fees to that Party's Tasmanian State branch. The C&G Divisional Secretary and C&G Divisional Branch Secretaries have lobbied politicians and political parties, conducted campaigns and held rallies, building up political connections through their offices, and communicating their activities to their members. Recent C&G Division and C&G Divisional Branch campaigns include advocating for the criminalisation of industrial manslaughter, prohibition of the use, importation, and manufacture of engineered stone, the abolition of the Australian Building and Construction Commission and the Building Code, management of the housing crisis through increased taxation of corporate profits, and the securing of Australian jobs.

343 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 43-44 [170]-[171]; 419 ALR 457 at 510.

344 *Clubb v Edwards* (2019) 267 CLR 171 at 337-338 [480].

232 There were 292 offices, identified in Annexure B of the Determination, that were "vacated for the duration of the administration" by cl 3(1)(a) of Annexure A of the Determination. Those offices included "members of the Divisional Executive, Divisional Conference, Divisional Trustees, Divisional Branch Committee of Management, Divisional Branch Council and Divisional Branch Trustees". In purely formal terms, those former officers, and the members they represented, remain free to engage in political activity either individually or in association with each other. But the practical reality of the removal of 292 offices is the removal of the incumbents' political platform, the blunting of their political connections, and the stifling of their ability to exploit their political know-how and expertise born from lobbying and campaigning. Thus, as Mr Hiscox submitted, the power to remove officeholders from their offices stifles the ability of those officeholders to participate in political matters that affect the interests of members. Individually, such former officeholders retain their liberty to speak. But the megaphone of their office is removed. So too, for the reasons below, do the Legislative Amendments remove those aspects of political influence that the former officeholders wielded by virtue of their ability to access the organisational purse.

233 Section 323K(1) of the FWRO Act gives the Administrator control over the property of the C&G Division, including the ability to manage and dispose of that property. Consistent with s 323K(1), cl 6(1)(a) of Annexure A of the Determination gives the Administrator the powers and duties of the C&G Divisional Conference and the C&G Divisional Executive. The Divisional Conference is the supreme governing body of the C&G Division, with powers that include spending such funds (held by the CFMEU as the only legal entity) as are necessary to carry out the objects of the CFMEU as they relate to the C&G Division³⁴⁵ and reviewing the expenditure of the C&G Divisional Executive.³⁴⁶ Clause 6(1)(b) gives the Administrator the same powers and duties of the C&G Divisional Branch Council and the C&G Divisional Branch Management Committee.³⁴⁷ In effect, therefore, the Determination grants the Administrator the exclusive trust power, during the course of the administration, over funds that are held on trust by the CFMEU for the members of the C&G Division.³⁴⁸

234 However, the depth and width of the burden upon free political communication imposed by s 323B, in its application by the Determination, are

345 C&G Division Rules, r 8.

346 C&G Division Rules, r 9(15).

347 See C&G Division Rules, rr 40, 42.

348 See CFMEU Rules, rr 4(w), 23(vi), 27(iii); C&G Division Rules, rr 14, 35(a), 40(4)(a).

mitigated in two significant respects by two obligations imposed by s 323K(5). Neither of those obligations is removed or reduced by the provision in s 323F(b) that any action taken under a scheme will "have effect despite anything in [the FWRO Act]". An action that is validated under s 323F(b) must be "under [a] scheme" and the content of a scheme under s 323B must be consistent with the obligations of the Administrator under s 323K(5). The two obligations that mitigate the depth and width of the burden are as follows.

235 First, s 323K(5)(a) of the FWRO Act requires the Administrator to be satisfied that he is acting in the best interests of the members of the C&G Division and its branches. That obligation necessarily includes when the Administrator takes any action to amend the C&G Division Rules or to use any property of the C&G Division, defined in s 323K(6) as "property of the CFMEU that, immediately before [the Legislative Amendments] commenced, was solely or predominantly used for the benefit or the purposes of the [C&G] Division or any of its branches". In other words, in exercising the trust powers that the Administrator has over CFMEU property that is held on trust for the C&G Division members, the Administrator must be satisfied that he is acting in the best interests of those members. The best interests of the members are most clearly determined by reference to the C&G Division Rules at the time of the Determination. Indeed, as Beech-Jones J observes, in exercising those powers the Administrator may also be subject to fiduciary duties. It is unnecessary to decide whether any such duties in equity are displaced by the s 323K(5) duty for the Administrator to be satisfied that he is acting in the best interests of members of the C&G Division.

236 Secondly, s 323K(5)(b) requires the Administrator to "have regard to the objects of the CFMEU as defined in the rules of the CFMEU at the commencement of [the administration], so far as they are lawful". The numerous objects (which are also objects of the C&G Division) include, in broad terms, "to improve, protect, and foster the best interests of the [CFMEU]", raising political levies and donating to and affiliating with political parties, securing and assisting in securing various legislation, doing "all things conducive to the welfare and organisation of the working class", and protecting members "from any infringement of their rights".³⁴⁹

(iv) The purpose of the Legislative Amendments is legitimate

237 The motives of some legislators, and the foreseeable effects and intended means of application of the Legislative Amendments, may have been to impose a burden on free political communication. But, as has been explained in detail above, the purpose of legislation is distinct from motives, means, and foreseeable effects. The purpose of the Legislative Amendments was to enable the C&G Division to be returned to lawful operation in its members' interests in an effective, efficient,

349 CFMEU Rules, r 4.

and accountable manner.³⁵⁰ The purpose was not to burden the freedom of political communication. The purpose is legitimate.

(v) *The burden imposed is proportionate*

(a) Suitability of the legislative means: rational connection with purpose

238 Since purpose is objectively determined, and since the legislative means adopted will be an important part of the interpretation of legislative purpose, it is hard to conceive how legislative means could not be rationally connected with any objective purpose that is properly identified by "ordinary processes of interpretation, including considering the meanings of statutory words in the provision, meanings of other provisions in the statute, the historical background to the provision, and any apparent social objective".³⁵¹ Indeed, in a rare case where a law exists with no purpose ascertainable at any level of generality higher than the meaning of the law itself, the effect of the law will itself be the purpose.

239 The Legislative Amendments are suitable in the sense that they are rationally connected to their purpose of enabling the C&G Division to be returned to lawful operation in its members' interests in an effective, efficient, and accountable manner.

(b) Reasonable necessity of the legislative means

240 This issue focuses upon whether there is an obvious and compelling alternative means, which is at least as effective but with a significantly lesser impact upon freedom of political communication than the Legislative Amendments, for Parliament to return the C&G Division to lawful operation in its members' interests in an effective, efficient, and accountable manner. The plaintiffs and Mr Hiscox did not identify any means short of some form of administration that would be at least as effective, "quantitatively, qualitatively, and probability-wise".³⁵² That approach was correct. The extent of both the findings of legal contraventions and the allegations of corruption and other lawlessness described in the opening of these reasons was such that any means short of administration would not have been as effective.

350 See above at [200].

351 *Ruddick v The Commonwealth* (2022) 275 CLR 333 at 384 [133], quoting *Unions No 2* (2019) 264 CLR 595 at 657 [171].

352 *Tajjour v New South Wales* (2014) 254 CLR 508 at 571 [114], quoting Barak, *Proportionality: Constitutional Rights and their Limitations*, trans Kalir (2012) at 324.

241 The plaintiffs and Mr Hiscox submitted, however, that an equally effective means of achieving the same purpose, with a less restrictive effect on the freedom of political communication, would be for the administration to take place under the pre-existing s 323 of the FWRO Act. Indeed, on 2 August 2024, three weeks before the Determination, the General Manager of the Fair Work Commission had applied to the Federal Court of Australia for declarations and orders under s 323 of the FWRO Act, including an order approving a scheme in relation to the C&G Division and some of its Divisional Branches on the basis, required by s 323(1) of the FWRO Act, that the C&G Division and its branches had ceased to function effectively and there were no effective means under the rules of the CFMEU by which they could be enabled to function effectively.

242 The submissions of the plaintiffs and Mr Hiscox should not be accepted for two reasons. First, a scheme of administration under s 323 would not be at least as effective to achieve that part of Parliament's legitimate purpose which is concerned with returning the C&G Division to lawful operation in its members' interests in an efficient manner. As rapidly as the Federal Court might have operated to determine the General Manager's application under s 323, there was substantial evidence to be filed, written submissions to be made, a hearing to be allocated and undertaken, issues to be considered, and reasons to be prepared. As the Commonwealth and the Attorney-General of the Commonwealth submitted, there may even have been questions concerning the power of the Court to appoint an external administrator when approving a scheme under s 323(2) "for the taking of action by a collective body *of the organisation* ... or by an officer or officers *of the organisation*" (emphasis added).³⁵³ By contrast, the Determination was instant and immediate and not subject to the legal doubt that surrounded the scope of s 323.

243 Secondly, although s 323B might arguably permit schemes that impose greater restrictions upon the implied freedom of political communication than the scheme that is the subject of the Determination, for the reasons explained above³⁵⁴ the appropriate manner to assess the validity of the Legislative Amendments is by reference to their application in the scheme that is the subject of the Determination. The constraints under s 323K(5) upon the scheme that is the subject of the Determination, including the preservation of the objects of the CFMEU and the requirement for the Administrator to act in the best interests of the C&G Division members, are at least as restrictive as the constraint imposed by s 323(4) that the "Court must not make an order ... unless it is satisfied that the order would not do substantial injustice to the organisation or any member of the organisation".

244 It is true, as Mr Hiscox submitted, that the Federal Court might have approved a scheme that excluded the ACT Divisional Branch of the C&G

353 Compare *Brown v Health Services Union* (2012) 205 FCR 548 at 586 [114].

354 At [226]-[229].

Division, which had not been included in the application by the General Manager and whose officers had been subject to very few findings of contravention. But it is neither obvious nor compelling that such a scheme would have been as effective. The ACT Divisional Branch is not autonomous from the other branches of the C&G Division. All branches are governed by the C&G Divisional Conference as a "supreme governing body". Further, the C&G Divisional Executive is a common executive to all branches and officeholders. The special case describes officeholders of each of the C&G Divisional Conference and the C&G Divisional Executive as having contravened industrial laws.

(c) Adequacy of the legislative scheme in the balance

245 Mr Hiscox and the plaintiffs characterised Parliament's response to officers of the C&G Division's contraventions of industrial laws and the allegations of further wrongdoing in strong terms. Mr Hiscox characterised Parliament's response as "draconian". The plaintiffs pointed to the "unthinkable" notion that:

"while in administration, the [C&G Division] should be unable to participate in debate, say, about the very laws that permit the administration ... to use [C&G Division] money to argue against the law that brought about this position and to seek punishment at the ballot box for those who sponsored it ... [It] is an extraordinary proposition made all the more galling because [C&G Division] money will be used to defray the expenses of the administration".

That submission is only softened slightly by the ability of former officeholders to participate in debate without the power and authority of their office and by the obligation of the Administrator to use his trust power over funds held for the benefit of the C&G Division members in the best interests of those members.

246 Parliament's policy decision to place one of the three divisions of the CFMEU into administration was a forceful response to contraventions of industrial laws by officers of that division and allegations of their misconduct, with a deep and wide impact upon the freedom of political communication, albeit an impact that is mitigated in two significant respects. But to conclude that this response was inadequate in the balance involves saying that the *Constitution* precludes Parliament from making a policy decision that is reasonably necessary (or, perhaps more accurately, reasonably capable of being seen as necessary) to implement its legitimate purpose because the importance of Parliament's policy objective is outweighed in the balance by the importance of free political communication.

247 Such a conclusion is difficult for a court to reach in ordinary circumstances. The principles of representative and responsible government, which underpin the implied freedom of political communication, require that Parliament have the power to make policy decisions as the representative of the Australian people. And the difficulty of reaching this conclusion becomes an impossibility when the policy

of Parliament that is said to be outweighed by free political communication is concerned with responding to repeated breaches of the law and serious allegations of corruption and violence as set out above.

(vi) *Conclusion*

248 The Legislative Amendments, in their application by the Determination, are not inconsistent with the implied freedom of political communication.

VI. Chapter III of the *Constitution*: non-judicial punishment

(i) *The issue*

249 Although the plaintiffs' question concerning Ch III of the *Constitution* was expressed by reference to the Legislative Amendments generally, the focus of their submissions was only upon the power of the Minister in s 323B of the FWRO Act to determine a scheme dealing with the property held on trust for the members of the C&G Division and the power in s 323K for the Administrator to control the property of the CFMEU that is held for the benefit of the C&G Division. The submissions of the plaintiffs oscillated between treating the effect of ss 323B and 323K as conferring the judicial power to punish on the Executive and conferring that power on the legislature.

250 It is unnecessary to determine whether any penalty imposed by ss 323B and 323K, or by the exercise of powers under those provisions, should be characterised as either or both of: (i) executive punishment; or (ii) legislative punishment in substance amounting to a bill of attainder, or formerly a bill of pains and penalties.³⁵⁵ In either event, if the plaintiffs are correct that ss 323B and 323K impose punishment for breach of a rule of conduct then those provisions, and the balance of the Legislative Amendments which depend upon them, are invalid. It was not suggested that if s 323B or s 323K were punitive then either provision could fall within any historical circumstance of executive³⁵⁶ or legislative³⁵⁷ punishment that is an express or implied limit upon the treatment by the *Constitution* of punishment as being the exclusive province of the judiciary.

355 *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 535-536, 612-613, 645-646, 685-686, 719-721.

356 For instance, *Private R v Cowen* (2020) 271 CLR 316 at 388-391 [183]-[190].

357 *Constitution*, s 49, discussed in *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 167. See also *Burdett v Abbot* (1811) 14 East 1 at 159-160 [104 ER 501 at 561-562]; *Kielley v Carson* (1843) 4 Moo PC 63 at 89 [13 ER 225 at 235].

(ii) *The test and the fiction*

251 The present test for whether a legislative measure is punitive is that adopted by a majority of this Court in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs*,³⁵⁸ adapting and developing another recent authority.³⁵⁹ It appears that the test for whether legislative means are punitive involves two stages. The first stage asks whether the means used by Parliament are "prima facie punitive ... (by default or otherwise)"; if so, then, at the second stage, those means will be punitive unless they are "reasonably capable of being seen to be necessary (in the relevant sense of 'reasonably appropriate and adapted' ...) for a legitimate and non-punitive purpose".³⁶⁰

252 As a matter of precedent, unless there were compelling reasons to depart from it, I should endeavour to make the best sense of, and to apply, the test supported by a majority of this Court in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* for whether legislative means are punishment. But with great respect, the state of the present jurisprudence concerning the concept of punishment in Ch III of the *Constitution* is extremely difficult to understand or apply and involves a legal fiction. The test is essentially that a legislative means is "punitive" if it is prima facie punitive, unless a court concludes that it is not punitive because it is not for a punitive purpose.

253 The difficulty to understand or apply the test arises because the meaning of "punitive" changes in the different places it is used in the test. At the stage of asking whether a legislative means is "prima facie punitive", the notion of punishment seems to mean that the means will involve some significant interference with "basic rights" such as "liberty or bodily integrity".³⁶¹ Although it is apparently accepted that "in the protection of bodily integrity, the law 'cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it ...'",³⁶² this is said not to be the case with a "prima facie punitive"

358 (2024) 99 ALJR 1; 419 ALR 457.

359 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005; 415 ALR 254.

360 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 12 [18]; 419 ALR 457 at 468.

361 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 11 [14], 12 [18]; 419 ALR 457 at 467, 468.

362 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 11 [15]; 419 ALR 457 at 467, quoting *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at

measure under the *Constitution*. It is said that "[t]here are many interferences with bodily integrity and liberty authorised by the legislature, both significant and insignificant, which are non-punitive".³⁶³ In any event, however one assesses whichever significant interferences with bodily integrity and liberty are prima facie punitive, there appears to be no role for considerations almost universally associated with punishment, such as retribution and deterrence.

254 By contrast, the "prima facie" conclusion that a legislative means is punitive will be confirmed if the legislative means is not proportionate to a legitimate purpose ("reasonably capable of being seen to be necessary (in the relevant sense of 'reasonably appropriate and adapted' ...) for a legitimate and non-punitive purpose"³⁶⁴). Although it seems that when asking whether the purpose is "punitive" the true sense of punitive is applied (since a punitive measure is one imposed for the purposes of punishment³⁶⁵), the proportionality testing fictitiously deems those means which are not punitive, because they have no punitive purpose, nevertheless to be punitive. As I explained in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs*,³⁶⁶ this is a fiction because nowhere else in law or in life does the disproportionate pursuit of a legitimate purpose necessarily amount to punishment solely because the means used affect some fundamental rights of another, such as rights to bodily integrity or liberty.³⁶⁷

(iii) *The parties' and interveners' attempts to apply the YBFZ test*

255 The plaintiffs understandably seized upon the confused state of the present jurisprudence concerning the concept of "punishment" in the *Constitution*. They submitted that a person's right to property is a fundamental right and that deprivation of property by forfeiture has historically been used as a form of punishment. Similar arguments were made about the imposition of disabilities and disqualifications upon persons in their employment. The plaintiffs submitted that

233, itself quoting Blackstone, *Commentaries on the Laws of England*, 17th ed (1830), bk 3, ch 8 at 120.

363 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 12 [15]; 419 ALR 457 at 467.

364 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 12 [18]; 419 ALR 457 at 468.

365 See *Plaintiff M96A/2016 v The Commonwealth* (2017) 261 CLR 582 at 594 [22].

366 (2024) 99 ALJR 1 at 25-26 [94], 38 [145]-[148]; 419 ALR 457 at 486-487, 502-503.

367 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 11 [13]-[14]; 419 ALR 457 at 466-467, quoting, among other authorities, *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11.

these measures were not reasonably necessary means for a legitimate non-punitive purpose.

256 If significant interferences with basic rights were to be deemed to be "prima facie punitive ... (by default or otherwise)",³⁶⁸ then it would be difficult to see why those basic rights would not include a right to property. The right to private property has been regarded as a fundamental right for centuries.³⁶⁹ Indeed, a person's fundamental right to private property has even been suggested to be capable in some circumstances of prevailing over another's fundamental right to bodily integrity.³⁷⁰ Further, the plaintiffs are correct that forfeiture of property for punitive purposes has long historical antecedents as a form of genuine (and not deemed) punishment.³⁷¹ In this case, therefore, it would be difficult to see why the forfeiture of the use of assets held for a person's benefit, or the deprivation of a person's office or employment, and potentially their livelihood ("usually one of the most important things in [a person's] life"³⁷²), would not be sufficiently serious interferences with a basic right even if these deprivations might only be for a period of five years³⁷³ (or earlier if the scheme is revoked upon written notice from the Minister of the Minister's satisfaction that revocation is in the public interest having regard to Parliament's intention in enacting the FWRO Act³⁷⁴).

257 By contrast, the Commonwealth, the Attorney-General of the Commonwealth, and the Attorney-General of Queensland (intervening) submitted, with strict and literal fidelity to the reasoning of the joint judgment in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs*, that measures that are "prima facie punitive" include only interferences with bodily integrity

368 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 12 [18]; 419 ALR 457 at 468.

369 Blackstone, *Commentaries on the Laws of England* (1765), bk 1, ch 1 at 125; *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* (2024) 98 ALJR 956 at 978 [90]; 418 ALR 639 at 664-665.

370 *Roy v O'Neill* (2020) 272 CLR 291 at 307 [31]-[32], 309 [38]. Compare 313 [55].

371 Blackstone, *Commentaries on the Laws of England* (1766), bk 2, ch 18 at 267-268; Blackstone, *Commentaries on the Laws of England* (1769), bk 4, ch 29 at 374-382; Maitland, *The Constitutional History of England* (1908) at 212-213. See *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 416-417 [16].

372 *Elisha v Vision Australia Ltd* (2024) 99 ALJR 171 at 188 [67]; 421 ALR 184 at 204, quoting *Johnson v Unisys Ltd* [2003] 1 AC 518 at 539 [35].

373 FWRO Act, s 323A(2).

374 FWRO Act, s 323D(1A). See also s 323D(2A).

(including human life) or liberty. The Commonwealth and the Attorney-General of the Commonwealth correctly submitted that if a legislative means were to amount to punishment by interference with property rights, independently of the true purposes of punishment (generally purposes of retribution for, but also deterrence of, a breach of rules of conduct³⁷⁵), then the *Constitution* would have introduced, by implication, a different test for justification than that expressly required by s 51(xxxi). In my view, that powerful submission does not support drawing lines between some constitutionally protected basic rights and others. Rather, the submission reinforces the difficulty with fictitious notions of punishment.³⁷⁶

(iv) *The test should be preserved but stripped of fictions*

258 The difficulties and confusion that surround the application of the test in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* can be avoided whilst maintaining fidelity to central aspects of the reasoning of the joint judgment in that case by applying the test for validity proposed by that judgment stripped of fictions associated with notions of deemed punishment as part of a head of power analysis. The only part of the test which applies to the Ch III question of whether a legislative means falls within the exclusively judicial power to punish should therefore be whether a purpose of the law is punitive (in a real sense). If no purpose of the law is punitive, then the law is not a law for the purposes of punishment.³⁷⁷ The other aspects of the test—whether the law involves an interference with a fundamental right and whether the legislative means are proportionate to (reasonably capable of being seen to be necessary for) a legitimate purpose—are matters relevant to an assessment of whether the law is within a head of power, as explained earlier in these reasons.

259 In assessing whether a law is made for a punitive purpose, the harshness of the effect of the law can sometimes suggest that the law is made for core purposes of punishment, to sanction and impose retribution for, but also to deter, proscribed conduct.³⁷⁸ But the harshness of an effect does not by itself make a legislative purpose punitive.³⁷⁹ Extremely harsh consequences, even removal from the

375 See *Palmer v Western Australia* (2021) 274 CLR 286 at 296 [15].

376 See *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 25 [94]; 419 ALR 457 at 486.

377 See *Plaintiff M96A/2016 v The Commonwealth* (2017) 261 CLR 582 at 594 [22].

378 *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 424-427 [239]-[246].

379 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 12 [17]; *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 at

country,³⁸⁰ might be imposed as a means of regulation of rights or other interests for the benefit of the community rather than as a sanction for proscribed conduct.³⁸¹

(v) *Sections 323B and 323K are not punitive*

260 Both ss 323B and 323K of the FWRO Act share the purpose of Pt 2A generally, namely to enable the C&G Division to be returned to lawful operation in its members' interests in an effective, efficient, and accountable manner.³⁸² That purpose is implemented in a way that has a serious and deleterious effect upon those members of the C&G Division who hold offices and upon the use of assets by those officers for the benefit of members. But the purpose is one that remains solely concerned with regulating a state of affairs rather than imposing a sanction, or extending a sanction, for proscribed conduct (such as a regime of preventive detention to deter the commission of future offences based on the commission of past offences³⁸³).

261 Although no analogy is close to the present circumstances, some loose analogies can be given which demonstrate the non-punitive nature of the purpose of returning an organisation to lawful operation in its members' interests in an effective, efficient, and accountable manner. For instance, there is no punitive purpose in: the suspension of a liquidator's registration involving regulation "by reference to professional standards";³⁸⁴ "maintaining professional standards" by

358-359 [17]; *Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381 at 385 [11], 386 [16]; *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at 371-372 [33].

380 *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 343 [29].

381 *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899 at 920-921 [92]; 415 ALR 1 at 25.

382 See above at [200].

383 *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 154-159 [196]-[204].

384 *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 at 360 [24], 361 [27]-[28].

disqualifying a person from managing a corporation;³⁸⁵ or cancellation of a broadcasting licence for offences that breach conditions of the licence.³⁸⁶

262 The involuntary external administration effected by Pt 2A, including ss 323B and 323K, is a regulatory measure in the same broad manner. Indeed, the detailed complaints procedure that Pt 2A establishes is concerned not only with illegality, but with standards of propriety generally, in the investigation of "improper, unlawful or criminal" conduct by a range of people associated with the C&G Division.³⁸⁷ Nothing in Pt 2A suggests any purpose of retribution, anything analogous to a purpose of retribution, or even any ancillary purpose of punishment such as deterrence.

VII. Acquisition of property: s 51(xxxi) of the *Constitution*

263 The final issue concerns whether any of the Legislative Amendments are invalid because they are laws authorising the acquisition of property otherwise than on just terms within the meaning of s 51(xxxi) of the *Constitution*. The plaintiffs' submissions focused upon s 323K and s 323M separately. As to s 323K, the plaintiffs asserted that the Administrator's control over "property ... of the [C&G] Division and its branches" by s 323K amounted to an acquisition of property within s 51(xxxi), even though the same could not be said of other administrations. As to s 323M, the plaintiffs submitted that this provision effected an acquisition of property by creating the Administrator's entitlement "to receive remuneration for necessary work properly performed by the administrator in relation to the administration"³⁸⁸ with "remuneration ... to be paid from the funds of the CFMEU".³⁸⁹

264 The plaintiffs face obstacles in their submissions that s 323K(1) effects an "acquisition" of property. The plaintiffs did not suggest that any equitable rights of the members of the C&G Division were acquired. The assets held on trust for those members by the CFMEU are controlled and managed by the Administrator, who must, at least, be satisfied that his actions are taken in the best interests of the C&G Division members. The property which the plaintiffs assert has been acquired under s 323K must therefore be the trust power of the CFMEU in relation

385 *Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381 at 385 [11].

386 *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at 378-379 [58].

387 FWRO Act, s 323HA(2).

388 FWRO Act, s 323M(1).

389 FWRO Act, s 323M(2).

to the assets that it holds on trust for the members of the C&G Division. The effect of s 323K(1), as explained above,³⁹⁰ is to vest that trust power in the Administrator. But there may be difficulties in seeing the Administrator's duty to exercise a trust power as "property".³⁹¹ The plaintiffs also face obstacles in their submissions that s 323M effects an "acquisition" of property by remunerating the Administrator from CFMEU funds for work done for the benefit of the C&G Division. The property that the plaintiffs contend has been acquired by s 323M must be the legal right of the CFMEU to money held for the benefit of C&G Division members that is paid to the Administrator for his services as "a necessary or characteristic feature of the means which the law selects to achieve its objective".³⁹²

265 Those obstacles can be put to one side because even if s 323K and s 323M effect an acquisition of property within s 51(xxxi), s 323S(1) provides for the Commonwealth to be "liable to pay a reasonable amount of compensation". Although this Court has sometimes considered it appropriate to determine whether there was an acquisition of property despite the presence of such a clause,³⁹³ it is appropriate to resolve this issue in the special case on a confined basis for three reasons. First, this issue was not at the forefront of the special case. Secondly, the Administrator's property under s 323K (which would seem to be in the nature of a duty to exercise a trust power) was not the subject of substantial submissions; indeed, it was only acknowledged briefly in oral submissions that the Administrator's rights under s 323K are in relation to a trust fund. Thirdly, s 323S provides a complete answer to the plaintiffs' submissions on this issue.

266 Section 323S(1) provides as follows:

"If the operation of [Pt 2A or the Determination] would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) from a person otherwise than on just terms (within the

390 At [233].

391 See, in relation to bankrupt estates, *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 170, 178, 188, citing *Re Döhnert Müller Schmidt and Co; Attorney-General of the Commonwealth v Schmidt* (1961) 105 CLR 361 at 372.

392 *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 180 [98], quoting *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 180-181.

393 *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 230 [42]. See also *Wurridjal v The Commonwealth* (2009) 237 CLR 309.

meaning of that paragraph), the Commonwealth is liable to pay a reasonable amount of compensation to the person."

Section 323S(2) provides that if the Commonwealth and the person do not agree on the amount of compensation, then the person may institute proceedings to have the amount determined by a specified court.

267 Since the introduction of s 21 of the *Historic Shipwrecks Act 1976* (Cth), ubiquitous clauses in forms similar to this "well-recognised and preferable form"³⁹⁴ have been included in Commonwealth legislation, with these clauses preventing such legislation being found to be invalid due to s 51(xxxi) of the *Constitution*.³⁹⁵ The plaintiffs did not deny that payment of a reasonable amount of compensation for any acquisition of property under s 323K or s 323M would be "just terms". Instead, the plaintiffs argued that any compensation would be payable to the CFMEU and allocated under the CFMEU Rules to the C&G Division,³⁹⁶ which, by s 323K(1), would be controlled by the Administrator, thus creating a requirement for further compensation. Section 323S was therefore said by the plaintiffs to be a "snake eating its own tail".

268 The simple answer to the plaintiffs' submissions is that if s 323K or s 323M did cause property to be acquired within the meaning of s 51(xxxi), then any court order for compensation to be paid to the CFMEU under s 323S would not be property under the control or management of the Administrator within s 323K(6). In other words, the court order for compensation would not be "property of the CFMEU that, *immediately before [the Legislative Amendments] commenced*, was solely or predominantly used for the benefit or the purposes of the [C&G] Division or any of its branches" (emphasis added). In any event, any court order could be framed so that the compensation paid to the CFMEU under s 323S did not form part of the funds under the control or management of the Administrator within s 323K, requiring further compensation in the same amount and defeating the object of s 323S, as the snake devours its tail.

394 *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 389 [196].

395 *The Commonwealth v Western Australia (Mining Act Case)* (1999) 196 CLR 392 at 462-463 [197]; *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 228 [36], 230 [42]; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 364-365 [104], 388-391 [193]-[202], 429 [324], 470 [462]-[463], but compare 424-426 [303]-[309].

396 CFMEU Rules, r 23.

VIII. Conclusion

269 The questions should be answered as proposed by Gordon J.

270 STEWARD J. Subject to what follows, I respectfully agree with the reasons of Gordon J and adopt her Honour's description of the facts. I also agree with each of the answers proposed by Gordon J to the questions stated by the parties in the special case. In particular, I especially agree with her Honour's reasons concerning the correct and orthodox discernment of legislative intent and the proper use of extrinsic materials. I also agree with her Honour's statement of the purpose of the impugned provisions. There is nothing I can say which might usefully add to these aspects of her Honour's reasoning, save that it is unnecessary for me to adopt any part of those reasons concerning whether the impugned provisions have a purpose which is legitimate and which justifies any burden they may impose. That is because the impugned provisions do not burden the so-called implied freedom of political communication.

271 I also respectfully and generally agree with the reasons and conclusion of Edelman J on the issue of discerning legislative intent and concerning the purpose of the impugned provisions here.

The implied freedom of political communication

272 It is now time to speak again about the implied freedom of political communication. In *LibertyWorks Inc v The Commonwealth*³⁹⁷ and more recently in *Babet v The Commonwealth*³⁹⁸ I doubted whether the *Constitution* supports such an implication.³⁹⁹ Part of the reason for that was the division of opinion amongst members of this Court concerning the content of the test for the justification of a law which otherwise burdens the implied freedom of political communication.⁴⁰⁰ That division seriously undermines any suggestion that the implication in question is, by reason of the structure of the *Constitution*, "logically or practically necessary".⁴⁰¹ I shall return to the issue of necessity. Since *Babet* the division has

397 (2021) 274 CLR 1 ("*LibertyWorks*").

398 [2025] HCA 21.

399 I am far from the first to express concerns regarding the existence and cogency of the implied freedom: see, for example, *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 ("*Australian Capital Television*") at 180-184 per Dawson J; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 188-194 per Dawson J, 194-207 per McHugh J; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 257-258 per Dawson J, 259 per McHugh J; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 330-339 [337]-[348] per Callinan J; *Monis v The Queen* (2013) 249 CLR 92 at 181-184 [243]-[251] per Heydon J.

400 *LibertyWorks* (2021) 274 CLR 1 at 111-114 [298]-[304] per Steward J.

401 *Australian Capital Television* (1992) 177 CLR 106 at 135 per Mason CJ.

changed and has worsened. These various tests of justification have been developed, not really because they are "'securely based' in the text *and* structure of the *Constitution*",⁴⁰² but because there is a need for pragmatic controllers of an implication that is otherwise, for the reasons given below, too broad, ungainly and uncontrollable.

Its breadth is problematic

273 It is now clear to me that the implied freedom is too broad and has only become governable through the various doctrines of judicial justification that the Court deploys. I thus not only retain serious doubts about its cogency but am now convinced that it is very wrong. Given the vast scope of its application, it is just not sustainable.

274 In contrast, one of the useful attributes of other, more narrow, constitutional implications is that they are sometimes so self-evident that they do not need to be kept in check with any doctrine of justification (or such a need is much diminished). A narrow implication of this kind may speak for itself, and its utility may be apparent to all. Narrow implications from ss 7 and 24 of the *Constitution*, which ensure that our legislative representatives are "directly chosen by the people", illustrate the point. One of them was recently affirmed by this Court in *Ruddick v The Commonwealth*.⁴⁰³ In that case, Gordon, Edelman and Gleeson JJ (with whom I relevantly concurred⁴⁰⁴) said of the requirement of "choice":⁴⁰⁵

"The constraint implied by the requirement of choice is that the people must have the ability to make an informed choice, which restricts Parliament's ability to constrain the extent to which the people can 'convey and receive opinions, arguments and information concerning matter intended or likely to affect voting'."

275 It is curious that the *Ruddick* implication is so constrained given this Court's jurisprudence concerning the implied freedom. The *Ruddick* implication protects only the "bare foundations, of the electoral system"⁴⁰⁶ and reserves to the Parliament a "wide leeway of choice" to pass laws concerning all aspects of the

402 *Zurich Insurance Co Ltd v Koper* (2023) 277 CLR 164 at 180 [43], [45] per Gordon, Edelman and Steward JJ (emphasis in original).

403 (2022) 275 CLR 333 ("*Ruddick*").

404 *Ruddick* (2022) 275 CLR 333 at 398 [174] per Steward J.

405 *Ruddick* (2022) 275 CLR 333 at 390 [151] per Gordon, Edelman and Gleeson JJ (footnote omitted).

406 (2022) 275 CLR 333 at 390 [152] per Gordon, Edelman and Gleeson JJ.

electoral process, including "the fundamental features of the operation of elections".⁴⁰⁷ This Court's deference here to the will of the people, as expressed through its representatives, on matters that very much more directly affect the democratic choice guaranteed by ss 7 and 24 of the *Constitution* is really at odds with the ongoing march of the implied freedom.

276 Sections 7 and 24 of the *Constitution* might also conceivably justify other, analogous, implications about the quality and integrity of the electoral process, but only for a defined period – namely, from the time when an election is called to the time of the declaration of the poll. In *Australian Capital Television Pty Ltd v The Commonwealth*,⁴⁰⁸ McHugh J proposed such an implication concerning the electoral process. His Honour said:⁴⁰⁹

"The process includes all those steps which are directed to the people electing their representatives – nominating, campaigning, advertising, debating, criticizing and voting. In respect of such steps, the people possess the right to participate, the right to associate and the right to communicate. That means that, subject to necessary exceptions, the people have a constitutional right to convey and receive opinions, arguments and information concerning matter intended or likely to affect voting".

277 But even outside of the electoral process it must be accepted that politics touches, whether directly or indirectly, upon so many diverse issues; it is a boundless field of discourse. Any law which burdens, howsoever lightly, that vast field of political communication potentially presently triggers an application of the implied freedom.⁴¹⁰

278 It is the enormous scale of what constitutes political communication which is the problem with the current implication. It is just too broad. That can be seen in this very case. The appointment of a temporary administrator to a union to address perceived abuses of the law – something which, if true, is self-evidently a good thing – is nonetheless said to offend the implied freedom. As Gordon J so

407 (2022) 275 CLR 333 at 389 [149] per Gordon, Edelman and Gleeson JJ.

408 (1992) 177 CLR 106.

409 *Australian Capital Television* (1992) 177 CLR 106 at 232 per McHugh J (footnote omitted).

410 In contrast to the more confined implication favoured by Duff CJ and Davis J in *Reference re Alberta Statutes* [1938] SCR 100 at 134: "the limit ... is reached when the legislation effects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada".

rightly observes, if that be correct, then a question would arise as to whether any appointment of a liquidator, receiver, or administrator would infringe the implied freedom.⁴¹¹

279 The ever-expanding reach of the implied freedom can be seen in the work of this Court over recent years. That work reveals an inexorable feature; namely a direct focus in debate on whether the impugned law is justified, with the burden on the freedom (i.e. the first limb of the test in *Lange v Australian Broadcasting Corporation*⁴¹²) being easily discerned and sometimes conceded to exist. By way of example:

- (a) in *Tajjour v New South Wales*,⁴¹³ s 93X of the *Crimes Act 1900* (NSW) was found to impose such a burden but was nonetheless held to be valid. Section 93X made it an offence to habitually consort with two or more convicted offenders after being given an official warning against doing so by a police officer;
- (b) in *Clubb v Edwards*,⁴¹⁴ s 185D of the *Public Health and Wellbeing Act 2008* (Vic) was held to impose a burden on the implied freedom but was nonetheless held to be justified. This provision prevented a person from engaging in "prohibited behaviour" (communicating in relation to abortion in a manner that was likely to cause distress or anxiety) within a "safe access zone" (a radius of 150 metres from premises where abortions take place);
- (c) in *Comcare v Banerji*,⁴¹⁵ s 13 of the *Public Service Act 1999* (Cth) was said to impose a burden on the implied freedom but was nonetheless held to be justified. This provision required a public servant to at all times behave in a way that upholds "APS Values";
- (d) in *LibertyWorks*,⁴¹⁶ it was conceded that s 18 of the *Foreign Influence Transparency Scheme Act 2018* (Cth) imposed a burden on the implied freedom but was nonetheless held to be justified. Section 18 obliged a person who undertakes an activity on behalf of a foreign principal to

411 At [146] per Gordon J.

412 (1997) 189 CLR 520 ("*Lange*") at 567 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

413 (2014) 254 CLR 508.

414 (2019) 267 CLR 171.

415 (2019) 267 CLR 373.

416 (2021) 274 CLR 1.

register, in defined circumstances, under a scheme mandated by that Act; and

- (e) in *Farm Transparency International Ltd v New South Wales*,⁴¹⁷ ss 11 and 12 of the *Surveillance Devices Act 2007* (NSW) were found to impose a burden on the implied freedom but were nevertheless held to be justified. These provisions prohibited publication or communication of a record produced by an optical surveillance device installed by trespassing on land.

280 It is difficult, with respect, to see how any of the foregoing impugned laws might have substantially affected the *Constitution's* guarantee of a direct choice by the people in a federal election; at best the connection those laws had with the ability of the people to directly choose their representatives was merely indirect.⁴¹⁸ None of them threatened our democracy. And in several instances, the burden was said to arise from a State Act even though the implied freedom operates to fetter federal legislative power.⁴¹⁹

281 This trend was discerned by Heydon J over ten years ago and prior to any of the above authorities. In *Wotton v Queensland*, his Honour observed:⁴²⁰

"Indeed it is often conceded or assumed by those defending validity that the party challenging validity has satisfied the first limb [of *Lange*]. ... This common practice of concession or assumption that the first *Lange* limb is met tends to generate an insidious belief that it will always be met."

282 Like me, Heydon J went on to observe that this trend meant that the second limb of *Lange* – being that of justification – had thereby assumed much greater prominence in the jurisprudence of this Court and had led to "sharp divisions". His Honour said:⁴²¹

"To construe the first *Lange* limb in such a way that there will always or almost always be a burden, so that the proponent of legislative validity will

417 (2022) 277 CLR 537.

418 The same observation might also be made about the following cases: *Levy v Victoria* (1997) 189 CLR 579; *Kruger v The Commonwealth* ("the *Stolen Generations Case*") (1997) 190 CLR 1; *Coleman v Power* (2004) 220 CLR 1; *Wotton v Queensland* (2012) 246 CLR 1 ("*Wotton*"); *Monis v The Queen* (2013) 249 CLR 92.

419 *Lange* (1997) 189 CLR 520 at 560 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

420 (2012) 246 CLR 1 at 19 [41] per Heydon J.

421 *Wotton* (2012) 246 CLR 1 at 23 [53] per Heydon J (footnote omitted).

always or almost always have to fall back on the second limb, is to bring into play indeterminate considerations and render them crucial in every or almost every case. Those considerations are capable of being applied by each particular judge in a different way. They are considerations which tend to lead to sharp divisions of judicial opinion, with cases being decided by the reasoning of a bare majority or by majority agreement on the orders but not the reasoning that leads to them."

283 Naturally, there are many who may think that there is much to admire about an implied freedom with this breadth of application. There are no doubt many who would say that such a guarantee of freedom enhances and protects our democratic institutions. But the merits of the implication are not what matters. What matters is whether it is necessarily mandated by the *Constitution*, a document which contains no equivalent to the language of freedom of speech found in the First Amendment to the *Constitution of the United States*. In that respect, Australia took a different course from the United States of America. Australia preferred to rely upon the vigilance of its people as the best guarantee of freedom and democracy, rather than embrace the power of a benign directorate, no matter how beguilingly attractive that might be. As Dawson J observed in *Australian Capital Television*:⁴²²

"[T]he Australian Constitution, with few exceptions and in contrast with its American model, does not seek to establish personal liberty by constitutional restrictions upon the exercise of governmental power. The choice was deliberate and based upon a faith in the democratic process to protect Australian citizens against unwarranted incursions upon the freedoms which they enjoy. ...

Thus the Australian Constitution, unlike the Constitution of the United States, does little to confer upon individuals by way of positive rights those basic freedoms which exist in a free and democratic society. They exist, not because they are provided for, but in the absence of any curtailment of them. Freedom of speech, for example, which is guaranteed in the United States by the First Amendment to the Constitution, is a concept which finds no expression in our Constitution, notwithstanding that it is as much the foundation of a free society here as it is there. The right to freedom of speech exists here because there is nothing to prevent its exercise and because governments recognize that if they attempt to limit it, save in accepted areas such as defamation or sedition, they must do so at their peril. Not only that, but courts recognize the importance of the basic immunities and require the clearest expression of intention before construing legislation in such a way as to interfere with them. The fact, however, remains that in this country the guarantee of fundamental

422 (1992) 177 CLR 106 at 182-183 per Dawson J (footnotes omitted).

freedoms does not lie in any constitutional mandate but in the capacity of a democratic society to preserve for itself its own shared values."

284 The capacity of a democratic society to preserve for itself its own shared values explains why our democratic institutions were able to thrive for so long without the implied freedom. In that sense the implied freedom is a remedy that we have never really needed; it is a constitutional device designed to battle imaginary demons. As Heydon J observed in *Monis v The Queen*:⁴²³

"It is sometimes suggested that even if the implied freedom did not originally exist – which it did not – it was necessary to invent it in order to ensure that representative democracy operated properly. It is hard to agree in view of the more than satisfactory operation of representative and responsible democracy in Australia for fifty years before Federation, and then for the period, more than ninety years long, between Federation and the invention of the implied freedom."

285 There is simply no evidence to support a need for a textual or structural implication any broader than that so recently confirmed in *Ruddick* concerning the need for an informed choice in elections. That narrower implication is all that is needed.

The tests of justification are too unclear

286 Because the implication is engaged whenever the freedom of political communication is burdened, it needs to be controlled to prevent the invalidation of laws where the burden is justified. But this Court has two competing tests of justification and both suffer, with respect, from a lack of rigour and clarity.

287 The traditional test considers whether the purpose of the impugned law is legitimate, in the sense that it is consistent with the maintenance of the constitutionally prescribed system of government, and also considers whether the impugned provisions are reasonably appropriate and adapted to advance that legitimate purpose in a manner consistent with the maintenance of the constitutionally prescribed system of government.⁴²⁴

423 (2013) 249 CLR 92 at 183 [248] per Heydon J.

424 See, for example, *LibertyWorks* (2021) 274 CLR 1 at 53 [134] per Gordon J.

288 The other test, called structured proportionality, asks the following questions and does so in a particular order:⁴²⁵

- "1. Does the law effectively burden the implied freedom in its terms, operation or effect?
2. If 'yes' to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
3. If 'yes' to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

The third step ... is assisted by a proportionality analysis which asks whether the impugned law is 'suitable', in the sense that it has a rational connection to the purpose of the law, and 'necessary', in the sense that there is no obvious and compelling alternative, reasonably practical, means of achieving the same purpose which has a less burdensome effect on the implied freedom. If both these questions are answered in the affirmative, the question is then whether the challenged law is 'adequate in its balance'. This last criterion requires a judgment, consistently with the limits of the judicial function, as to the balance between the importance of the purpose served by the law and the extent of the restriction it imposes on the implied freedom."

289 These tests of justification rest upon insufficiently defined concepts. What, for example, is meant by a "constitutionally prescribed system of government"? That may be difficult to delineate given that this Court accepts that such a system of government may assume many diverse forms and that Parliament may legitimately choose one of them and reject others.⁴²⁶ Moreover, concepts of suitability, necessity and adequacy all require the formation of a judgment which can sometimes compel the making of judicial choices about the merit of the law being impugned; and then to do so often without the Court having the evidence

425 *Clubb v Edwards* (2019) 267 CLR 171 at 186 [5]-[6] per Kiefel CJ, Bell and Keane JJ (footnote omitted), quoting *McCloy v New South Wales* (2015) 257 CLR 178 at 193-195 [2]-[3] per French CJ, Kiefel, Bell and Keane JJ.

426 *McGinty v Western Australia* (1996) 186 CLR 140 at 169 per Brennan CJ, 244-245 per McHugh J; *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 86-87 [177]-[178] per Keane J; *Ruddick* (2022) 275 CLR 333 at 398 [174] per Steward J.

before it to perform that task adequately (assuming that this is possible). For example, in *Unions NSW v New South Wales*⁴²⁷ the implied freedom was invoked to impugn s 29(11) of the *Electoral Funding Act 2018* (NSW). That obliged the Court, in practical terms, to answer the following question: was \$20,000 (indexed for inflation) a sufficiently reasonable amount to permit a third-party campaigner to run a campaign in a by-election for an electoral district in the Legislative Assembly of New South Wales? But the materials before the Court simply did not establish whether or not \$20,000 was a reasonable amount.⁴²⁸ The Court received no expert evidence about this issue.

290 The competing test of structured proportionality at least seeks to introduce a measure of transparency and rationality. But even so, and as already mentioned, the words "suitable", "necessary" and "adequate"⁴²⁹ all invoke highly abstract concepts which lack sufficient precision, and which thereby promote uncertainty.

291 Consistently with my view that the implication in favour of freedom of political communication is very hard to sustain, the test of structured proportionality, which had enjoyed the support of a majority of this Court for ten years, was recently qualified by a differently constituted majority in *Babet*.⁴³⁰ It is now only an optional "tool of analysis". When this option must be exercised is entirely unclear. Moreover, this Court in *Lange* did not favour a variety of tests for justification. All their Honours said was, "[i]n the context of the questions raised by the case stated" there was no need in that case to distinguish between different concepts of justification.⁴³¹

292 I am not the first to be concerned with the unconfined generality of the implied freedom. It was noted by Heydon J in *Monis*, who said:⁴³²

427 (2023) 277 CLR 627 ("*Unions NSW (No 3)*").

428 *Unions NSW (No 3)* (2023) 277 CLR 627 at 660 [86] per Steward J.

429 *Clubb v Edwards* (2019) 267 CLR 171 at 186 [6] per Kiefel CJ, Bell and Keane JJ, quoting *McCloy v New South Wales* (2015) 257 CLR 178 at 193-195 [2]-[3] per French CJ, Kiefel, Bell and Keane JJ.

430 [2025] HCA 21 at [49] per Gageler CJ and Jagot J, [72] per Gordon J, [213] per Gleeson J, [242] per Beech-Jones J.

431 *Lange* (1997) 189 CLR 520 at 562 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

432 (2013) 249 CLR 92 at 181-182 [244] per Heydon J (footnote omitted), quoting Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review* (2010) at 32.

"The implied freedom of political communication has never been clear. If there were a federal bill of rights, the implied freedom of communication about government and political matters would be listed. 'Bills of rights are not moral or even political philosophies. They are, at best, bullet points from such philosophies'. Like other philosophical bullet points, the unclarity of the implied freedom gives the courts virtually untrammelled power to make of it what each judge wills."

293 I respectfully agree with the foregoing. The lack of clarity in the implied freedom makes it especially difficult for legislative drafters, the government and the people to know with any confidence whether a law is constitutionally valid – in the sense that, if that law arguably burdens the implied freedom of political communication, it may otherwise be sufficiently justified, but only by reference to a standard measured by judges and no-one else. Resort to highly generalised and abstract tests as constitutional principles leaves to the judge far too much discretion to decide what is valid and what is not. The implied freedom is thus fundamentally inutile as a rule of law. That is because purely abstract propositions are an anathema to a country that is supposed to be ruled by laws.

A judge's duty

294 So, I consider that the implied freedom of political communication accepted by this Court cannot be justified by reference to the text and structure of the *Constitution*. It is perhaps not even needed to ensure that representative democracy operates properly. But a majority of this Court accepts its existence and has done so for nearly 30 years. The following observation of Callinan J in *Coleman v Power* is thus apt:⁴³³

"No party or intervener sought to argue that *Lange* should be reconsidered. That may not relieve me of the necessity, if I am conscientiously of the view that it, as a decision of this Court, no matter that it be recent and unanimous, is incompatible with the Constitution, of deciding whether I am bound not to follow it, rather than obliged to apply it. I will proceed for present purposes however upon the basis that *Lange* accords with the Constitution and that I am obliged to apply it."

295 Likewise in the present matter, no party sought to dispute the existence of the implied freedom of political communication, and I, like Callinan J, am also obliged to apply it. It was on that basis that in both *LibertyWorks* and *Babet* I faithfully applied the implied freedom doctrine. Here I likewise apply the implied freedom doctrine by gratefully agreeing with all of Gordon J's reasons on that topic in this special case (save for her Honour's reasons concerning justification). But

433 (2004) 220 CLR 1 at 109 [289] per Callinan J.

that said, as I explained in *LibertyWorks*⁴³⁴ and for the foregoing reasons, a reconsideration (with leave if necessary) of the implied freedom's existence may be justified and a matter for full argument on another occasion.

296 The foregoing is an orthodox and settled expression of the duty of a judge of this Court when confronted with a doctrine of law which that judge is strongly convinced to be fundamentally wrong. It follows – with much regret on my part, but nonetheless with exactitude – the approach of Gibbs J in *Queensland v The Commonwealth*.⁴³⁵

Chapter III

297 I refer to, but do not repeat, what I said about this Court's Ch III jurisprudence in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs*.⁴³⁶ The plaintiffs' case which relies upon Ch III may be addressed shortly.

298 The power to appoint administrators to an entity, and analogous powers, are not exclusively vested in a Ch III court. Historically, powers of this kind have been exercisable by each of the judicial, executive and legislative branches of government.

299 Courts have long exercised a power to appoint administrators, receivers and liquidators.⁴³⁷ But the executive branch may also do so. An obvious example of a power to appoint an administrator which is exercisable by the executive branch is the Australian Securities and Investments Commission's ability to wind up a company.⁴³⁸ That is a power of relative antiquity. For example, a similar power

434 (2021) 274 CLR 1 at 113-114 [304] per Steward J.

435 (1977) 139 CLR 585 at 599-600 per Gibbs J.

436 (2024) 99 ALJR 1 at 44-54 [172]-[226] per Steward J; 419 ALR 457 at 511-524.

437 For example, s 461 of the *Corporations Act 2001* (Cth) confers a power on a court to wind up a company.

438 *Corporations Act 2001* (Cth), s 489EA. Other examples may be found in: s 487-1 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (the Registrar has the power to place, by written determination, an Aboriginal and Torres Strait Islander corporation under "special administration" if satisfied that certain grounds exist); Pt 7.3B of the *Corporations Act* (the Reserve Bank may place a licensee or related body corporate of a clearing and settlement facility under statutory management); and s 13A of the *Banking Act 1959* (Cth) (the Australian Prudential Regulation Authority may appoint an administrator to take control of an authorised deposit-taking institution).

existed in s 295 of the *Companies Act 1929* (UK) (exercisable by the registrar of companies).

300 Section 295 was considered by this Court in *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth*.⁴³⁹ That case concerned a power conferred on the Governor-General by the *National Security (Subversive Associations) Regulations* (Cth) to take control of, and then dissolve, certain private organisations. A contention that the regulations impinged upon the judicial power of the Commonwealth in contravention of s 71 of the *Constitution* was rejected by each of Latham CJ, Starke and McTiernan JJ. Latham CJ said:⁴⁴⁰

"No authority was quoted for the proposition that the dissolution of a company is a judicial act. It was said in a general way that the dissolution of a company affected the rights of the company. It is true that dissolution terminates the rights of a company, but it is a common provision in Companies Acts to provide for the dissolution of a company, not only by a court, but also by the direction of an official: See, for example, the English *Companies Act 1929*, s 295, by which it is provided that, after certain notices have been given by the Registrar of Companies, a company may be struck off the register, with the result that the company is dissolved ... Thus it is well recognized that a registered company may be dissolved without any judicial proceedings."

301 Starke and McTiernan JJ, in separate judgments, agreed with the Chief Justice in this respect.⁴⁴¹

302 An example of an exercise of legislative power to cancel the registration of an industrial organisation may be found in *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth*.⁴⁴² Amongst other issues, that case concerned a challenge to the validity of the *Builders Labourers' Federation (Cancellation of Registration) Act 1986* (Cth). Section 3 of that Act provided that the registration of the Australian Building Construction Employees' and Builders Labourers' Federation under the *Conciliation and Arbitration Act 1904* (Cth) was, by force of that section, cancelled. It was contended that the Act was invalid because it was an exercise of

439 (1943) 67 CLR 116 ("*Jehovah's Witnesses*").

440 *Jehovah's Witnesses* (1943) 67 CLR 116 at 138 per Latham CJ.

441 *Jehovah's Witnesses* (1943) 67 CLR 116 at 155 per Starke J, 156-157 per McTiernan J.

442 (1986) 161 CLR 88.

judicial power or because it involved an interference with judicial power. That contention was unanimously rejected by the Court, which said:⁴⁴³

"The Cancellation of Registration Act does not deal with any aspect of the judicial process. It simply deregisters the Federation, thereby making redundant the legal proceedings which it commenced in this Court. It matters not that the motive or purpose of the Minister, the Government and the Parliament in enacting the statute was to circumvent the proceedings and forestall any decision which might be given in those proceedings."

303 It follows that the appointment of the administrator here did not constitute an exercise of a power exclusively vested in the judicial branch of government.

Disposition

304 I would answer the questions of law stated by the parties in the same way as Gordon J.

443 *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88 at 96-97 per Gibbs CJ, Mason, Brennan, Deane and Dawson JJ.

305 GLEESON J. I agree with the answers proposed by Gordon J to the questions stated in the special case. I agree with her Honour's reasons for those answers, except for questions 2 and 3, concerning why the plaintiffs have failed to demonstrate any impermissible burden upon the implied freedom of political communication.

306 In relation to questions 2 and 3, the plaintiffs contended that the invalidity of the challenged legislative provisions (Pt 2A of Ch 11 of the *Fair Work (Registered Organisations) Act 2009* (Cth) ("the FWRO Act"), s 177A of the *Fair Work Act 2009* (Cth) and the *Fair Work (Registered Organisations) Amendment (Administration) Act 2024* (Cth)) and the *Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024* ("the Determination") made under s 323B(1) of the FWRO Act arose for the same reasons. First, the laws and the Determination have an illegitimate purpose of precluding political activity or donations by the Construction and General Division ("the C&G Division") of the Construction, Forestry and Maritime Employees Union. Secondly, they are otherwise not reasonably appropriate and adapted to any legitimate purpose, as they fail to satisfy any of the structured proportionality tests of suitability, necessity or adequacy in the balance.⁴⁴⁴ The two arguments were made by reference to Pt 2A.

307 I generally agree with the analysis of Beech-Jones J concerning the nature and extent of the burden upon the implied freedom effected by Pt 2A.⁴⁴⁵ As the plaintiffs submitted, the burden is exemplified by the breadth of political activity that was previously engaged in by the C&G Division and is now precluded, or at least stymied. That result is the inevitable consequence of the removal of officers of the C&G Division from their previous positions; and the appointment of the administrator to control the affairs of the Division, including control over use of the Division's property or funds to engage in political communication or to make political donations.

308 I also accept the Commonwealth defendants' characterisation of the purpose of Pt 2A, namely, to enable the C&G Division to be returned swiftly to a state in which it is governed and operates lawfully and effectively in its members' interests, for the ultimate goal of facilitating the operation of the federal workplace relations system ("the rehabilitation purpose"). Conversely, and again for the reasons given by Beech-Jones J, I reject the plaintiffs' contention that Pt 2A has an additional and

444 *McCloy v New South Wales* (2015) 257 CLR 178 ("*McCloy*") at 194-195 [2]; *Babet v The Commonwealth* [2025] HCA 21 ("*Babet*") at [226].

445 See reasons of Beech-Jones J at [434]-[458].

illegitimate purpose of suppressing political communication by the C&G Division or suppressing the Division's political viewpoints.⁴⁴⁶

309 While the persuasive burden to justify any restriction of the implied freedom falls upon a defendant,⁴⁴⁷ the scope of that task is affected by the contentions of the plaintiff. In this case, the parties framed their argument by reference to the structured proportionality approach first articulated in *McCloy v New South Wales*.⁴⁴⁸ No argument was made that the approach was inadequate because it provides insufficiently for variable scrutiny or, more specifically, because the approach provides for inappropriately calibrated scrutiny in this case.⁴⁴⁹

310 In this case, the plaintiffs did not dispute that the statutory purpose or object identified above is legitimate, so as to pass the test of compatibility first identified in *Lange v Australian Broadcasting Corporation*, that is, that the object of the relevant law is compatible with the maintenance of the constitutionally prescribed system of government.⁴⁵⁰ The rehabilitation purpose is compatible with, in the sense that it has no tendency to impinge upon, the constitutionally prescribed system of government,⁴⁵¹ and is not otherwise antithetical to the implied freedom.⁴⁵² More generally, the rehabilitation purpose does not exceed the Commonwealth heads of legislative power.⁴⁵³ To the contrary, the lawful and effective operation of the C&G Division can be expected to improve the prospects

446 See reasons of Beech-Jones J at [463]-[469].

447 *McCloy* (2015) 257 CLR 178 at 201 [24]; *Unions NSW v New South Wales* (2023) 277 CLR 627 at 644 [31].

448 (2015) 257 CLR 178.

449 cf Dixon, "Calibrated Proportionality" (2020) 48 *Federal Law Review* 92; Douek, "All out of Proportion: The Ongoing Disagreement about Structured Proportionality in Australia" (2019) 47 *Federal Law Review* 551.

450 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562, 567; *Brown v Tasmania* (2017) 261 CLR 328 at 363-364 [102]-[104].

451 *McCloy* (2015) 257 CLR 178 at 203 [31].

452 *Monis v The Queen* (2013) 249 CLR 92 ("*Monis*") at 148-149 [128]; cf *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 78-79. See also Kirk, "Revisiting Proportionality", paper delivered at the 3rd Leslie Zines Symposium, Australian National University, 30 November 2024 at 5, 12, 25.

453 Chordia, *Proportionality in Australian Constitutional Law* (2020) at 175; cf *Monis* (2013) 249 CLR 92 at 150-151 [132]-[138].

that the political communications and other activities of the Division will represent the interests of the Division's membership, thereby enhancing political communication. However, the plaintiffs argued that Pt 2A failed each of the structured proportionality tests of suitability, necessity and adequacy in the balance.

311 As to suitability, the plaintiffs' contention was that there was a lack of rational connection between the rehabilitation purpose and the terms of Pt 2A "in so far as [the provisions of Pt 2A] preclude the participation of the C&G Division in political communication". The test of rational connection between a law and its purpose asks whether the law (the means) is directed towards the object (or end) that is ostensibly put forward as its rationale.⁴⁵⁴ A law exhibits a rational connection to its purpose "if the means for which it provides are capable of realising that purpose".⁴⁵⁵ By focussing upon a particular operation of the law (that is, its effect on participation in political communication), the plaintiffs implicitly acknowledge that, except in that particular operation, the requisite rational connection exists. The plaintiffs' complaint does not deny the suitability of Pt 2A to achieve the rehabilitation purpose, but instead points to the very burden that is capable of being justified by the law's suitability. Part 2A satisfies the test of suitability by providing, among other things, for the placement of the C&G Division under administration, pursuant to a scheme having specified characteristics, and for the variation and revocation of the scheme including a five-year sunset, in terms that are capable of enabling the rehabilitation purpose to be achieved.

312 The necessity test asks whether there is "no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom".⁴⁵⁶ The plaintiffs identified s 323 of the FWRO Act as such an alternative. Section 323 permits an application to the Federal Court of Australia for a declaration that a part of an organisation, such as the C&G Division, has "ceased to exist or function effectively and there are no effective means under the rules of the organisation or branch by which it can be reconstituted or enabled to function effectively"⁴⁵⁷ and, consequently, approval of a scheme for the taking of action "to enable the branch, the part of the branch or

454 Chordia, *Proportionality in Australian Constitutional Law* (2020) at 51-52.

455 *Comcare v Banerji* (2019) 267 CLR 373 ("*Banerji*") at 400 [33].

456 *McCloy* (2015) 257 CLR 178 at 195 [2]; *Banerji* (2019) 267 CLR 373 at 401 [35], 452-453 [194]; *Ruddick v The Commonwealth* (2022) 275 CLR 333 at 349-350 [23], 372 [95].

457 *Fair Work (Registered Organisations) Act 2009* (Cth), s 323(1)(a).

the collective body to function effectively".⁴⁵⁸ The plaintiffs argued that s 323 is less restrictive of the freedom of political communication because of the operation of s 323(4), which prevents the Court from making an order under s 323 "unless it is satisfied that the order would not do substantial injustice to the organisation or any member of the organisation".

313 Section 323(4) does not render s 323 an "obvious and compelling alternative" to Pt 2A. It is far from obvious that s 323(4) would require the approval of a scheme that would be less burdensome upon freedom of political communication, noting that s 323(4) is directed to "substantial injustice", which cannot be assumed to include restrictions on political speech having regard to the nature of the implied freedom as a constraint on legislative and executive power, and not an individual right. Further, an application under s 323 may not have led to the approval of a scheme with all of the features provided for by Pt 2A (particularly, the appointment of an external administrator),⁴⁵⁹ nor of such a scheme within a timeframe comparable to that achieved by the enactment of Pt 2A.

314 A law will be "adequate in its balance" unless the benefit sought to be achieved by the law is manifestly outweighed by the adverse effect on the implied freedom.⁴⁶⁰ The plaintiffs contended that the discriminatory burden upon the implied freedom in respect of members of the C&G Division is a "manifestly excessive response to the objective of ensuring its 'lawful or effective' functioning".

315 In this case, the adverse effect on the implied freedom, that is, the burden imposed upon the implied freedom, has been explained by Beech-Jones J and is considerable.⁴⁶¹ However, the statutory limits upon the duration of the Determination,⁴⁶² and the duty of the administrator to act in the best interests of members of the C&G Division,⁴⁶³ ameliorate the burden of Pt 2A. Nevertheless, an important aspect of the *raison d'être* of the C&G Division is defeated by the administrator's assumption of control over the activities of the Division, including political communications and making political donations, which are among the

458 *Fair Work (Registered Organisations) Act 2009* (Cth), s 323(2)(b).

459 *cf Brown v Health Services Union* (2012) 205 FCR 548.

460 *McCloy* (2015) 257 CLR 178 at 195 [2]; *Banerji* (2019) 267 CLR 373 at 402 [38]; *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 34 [85]; *Babet* [2025] HCA 21 at [234].

461 See reasons of Beech-Jones J at [436]-[458].

462 *Fair Work (Registered Organisations) Act 2009* (Cth), s 323E.

463 *Fair Work (Registered Organisations) Act 2009* (Cth), s 323K(5)(a).

Division's principal activities. That adverse effect must be weighed against the compelling purpose of Pt 2A, being a purpose which is responsive to a history of unlawful conduct and dysfunction casting considerable doubt upon the legitimacy of the C&G Division as part of an organisation registered under the FWRO Act. The expected benefit, of enabling the C&G Division to be returned swiftly to a state in which it is governed and operates lawfully and effectively in its members' interests, is not outweighed by Pt 2A's impingement upon the implied freedom. Accordingly, the law is adequate in its balance.

316 Regarding Pt 2A through the prisms of suitability, necessity and adequacy in the balance, the law is "reasonably appropriate and adapted" to its legitimate purpose and does not exceed legislative power.

JAGOT J.

Background

317 The Construction, Forestry and Maritime Employees Union ("the CFMEU") is a union of actual and prospective employees employed or seeking employment in one or more of a multitude of industries and is registered as an employee association under the *Fair Work (Registered Organisations) Act 2009* (Cth) ("the FWRO Act").⁴⁶⁴ Its objects, as specified in the *Rules of the Construction, Forestry and Maritime Employees Union* ("the CFMEU Rules"), include: "[t]o uphold the right of combination of labour, and to improve, protect, and foster the best interests of the Union and its members, and to assist them to obtain their rights under industrial and social legislation";⁴⁶⁵ "[t]o do all things conducive to the welfare and organisation of the working class";⁴⁶⁶ "[t]o secure or assist in securing legislation for safety in or in connection with the Industries of the Union and for the general and material well being of members";⁴⁶⁷ "[t]o take part in any or all questions of matters affecting or involving the wages and conditions of labour";⁴⁶⁸ "[t]o raise funds by levies and/or other means for the furtherance of any one or more objects";⁴⁶⁹ and "[t]o raise political levies, donate to and/or affiliate with political parties and to partake in conciliation and/or arbitration systems in the States and for that purpose to have branches, divisions or divisional branches registered in the States".⁴⁷⁰

318 There are presently three Divisions of the CFMEU including, relevantly, the Construction and General Division ("the C&G Division").⁴⁷¹ There are also branches of the CFMEU in the States of Queensland (including the Northern

464 See *Fair Work (Registered Organisations) Act 2009* (Cth), ss 26(2) and 27.

465 *Rules of the Construction, Forestry and Maritime Employees Union*, rule 4(a).

466 *Rules of the Construction, Forestry and Maritime Employees Union*, rule 4(d).

467 *Rules of the Construction, Forestry and Maritime Employees Union*, rule 4(i).

468 *Rules of the Construction, Forestry and Maritime Employees Union*, rule 4(t).

469 *Rules of the Construction, Forestry and Maritime Employees Union*, rule 4(x).

470 *Rules of the Construction, Forestry and Maritime Employees Union*, rule 4(y).

471 *Rules of the Construction, Forestry and Maritime Employees Union*, rule 27(i)(a).

Territory), New South Wales, Victoria, Tasmania, Western Australia and South Australia, and in the Australian Capital Territory.⁴⁷²

319 The C&G Division, in common with the other two Divisions, has the power to make its own Divisional Rules⁴⁷³ and has done so in the *Rules of the CFMEU Construction and General Division and Construction and General Divisional Branches* ("the C&G Division Rules"). Under the C&G Division Rules, there are Divisional Branches. Generally, each member of the Division is attached to a Divisional Branch covering the locality in which the member resides.⁴⁷⁴ The Divisional Branches also have rules.⁴⁷⁵ The highest governing body of each Divisional Branch is the Divisional Branch Council.⁴⁷⁶ The Divisional Branch Council is the "highest deliberative body of the Divisional Branch" and has power, amongst other things, to "[t]ake such steps as it shall consider necessary to carry out all or any of the objects of the Union and to raise or spend such funds as are necessary to carry out the objects of the Branch and to raise or spend such funds as are necessary to carry out the objects".⁴⁷⁷

320 Both the CFMEU Rules and the C&G Division Rules contain detailed provisions regulating the election of members to decision-making positions within the CFMEU and the C&G Division. For example, by rule 13(i) of the CFMEU Rules, the CFMEU National Conference, the "supreme governing body" of the CFMEU, is to be convened every two years in accordance with the CFMEU Rules. Rule 13(ii)(a) provides that the "National Conference shall consist of all of the members of each and every Divisional Executive for every Division of the Union". Rule 18 of the CFMEU Rules regulates Divisional Executive elections. The CFMEU Rules also contain provisions for a National Women's Conference, a National Women's Committee, a National Executive Committee, and a National Executive, membership of each of which is subject to election. The C&G Division Rules, by rules 8 and 9, provide for election to the Divisional Conference, the

472 *Rules of the Construction, Forestry and Maritime Employees Union*, rule 28(i).

473 *Rules of the Construction, Forestry and Maritime Employees Union*, rule 27(iv).

474 *Rules of the CFMEU Construction and General Division and Construction and General Divisional Branches*, rules 4(i) and 4(iv).

475 *Rules of the CFMEU Construction and General Division and Construction and General Divisional Branches*, rule 19ff.

476 *Rules of the CFMEU Construction and General Division and Construction and General Divisional Branches*, rule 40(1).

477 *Rules of the CFMEU Construction and General Division and Construction and General Divisional Branches*, rule 40(4)(a).

supreme governing body of the C&G Division, as well as election to the Divisional Executive.

321 On 23 August 2024 the *Fair Work (Registered Organisations) Amendment (Administration) Act 2024* (Cth) ("the FWRO Amendment Act") commenced. The FWRO Amendment Act amended, relevantly, the FWRO Act by the insertion of Pt 2A into Ch 11 and the *Fair Work Act 2009* (Cth) ("the Fair Work Act") by the insertion of s 177A. The scheme of Pt 2A of Ch 11 of the FWRO Act provides for, amongst other things: the C&G Division to be placed under administration;⁴⁷⁸ the Minister to determine a scheme for the administration;⁴⁷⁹ the appointment of an administrator;⁴⁸⁰ a period of five years for the administration;⁴⁸¹ and the functions of the administrator.⁴⁸² On the same day, the Attorney-General of the Commonwealth made the *Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024* (Cth) ("the Scheme") under s 323B of the FWRO Act (as inserted by the FWRO Amendment Act). Section 177A of the Fair Work Act restricts "removed persons" (being persons, in effect, removed from their office in the C&G Division by or under the scheme for the administration) from being, purporting to be or holding themselves out to be a "bargaining representative" for the purposes of ss 176 and 177 of the Fair Work Act.

322 By a writ of summons filed on 3 September 2024 the plaintiffs, the Divisional Branch Secretary and Divisional Branch Assistant Secretary, respectively, of the Construction and General Queensland-Northern Territory Divisional Branch of the CFMEU before their offices were made vacant by the Scheme, sought declarations of invalidity of Pt 2A of Ch 11 of the FWRO Act and the Scheme, as well as s 177A of the Fair Work Act.

323 By a special case filed on 18 October 2024 the plaintiffs and the first and second defendants (the Commonwealth and the Attorney-General of the Commonwealth) agreed several questions of law for the opinion of the Full Court of this Court which may be summarised as follows: (1) are the impugned provisions and the Scheme invalid because they impermissibly burden the freedom of political communication protected by constitutional implication – a question which can be determined by reference to Pt 2A of Ch 11 of the FWRO Act, which the Scheme does not rise above; (2) are the impugned provisions invalid because

478 *Fair Work (Registered Organisations) Act 2009* (Cth), s 323A.

479 *Fair Work (Registered Organisations) Act 2009* (Cth), s 323B.

480 *Fair Work (Registered Organisations) Act 2009* (Cth), s 323C.

481 *Fair Work (Registered Organisations) Act 2009* (Cth), s 323E.

482 *Fair Work (Registered Organisations) Act 2009* (Cth), s 323K.

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they constitute punishment in the exercise of judicial power, which is prohibited by Ch III of the *Constitution*; (3) are the impugned provisions invalid because they authorise an acquisition of property on other than just terms contrary to s 51(xxxi) of the *Constitution*; and (4) are the impugned provisions invalid because they are not laws with respect to any constitutional head of power?

324 For the following reasons these questions are each to be answered in the negative.

Overview of key statutory provisions

325 Section 5(1) of the FWRO Act declares that it is "Parliament's intention in enacting this Act to enhance relations within workplaces between federal system employers and federal system employees and to reduce the adverse effects of industrial disputation".

326 Part 2A of Ch 11 of the FWRO Act provides for the administration of the C&G Division and its branches. By force of s 323A(1) in Div 1 of Pt 2A of Ch 11 the C&G Division and each of its branches is "placed under administration" from the time when an instrument is made under s 323B(1) and an administrator is appointed under s 323C. By s 323A(2) the administration ends on the fifth anniversary of the day it began (unless ended sooner under s 323D). By s 323B(1) the Minister may determine a scheme for the administration of the C&G Division and its branches if satisfied that, having regard to Parliament's intention in enacting the FWRO Act, it is in the public interest for the C&G Division and its branches to be placed under administration. By s 323B(3), without limiting the Minister's power in s 323B(1), the scheme must provide for specified matters including: the person who is to be appointed as the administrator of the scheme; suspension or removal of officers; declarations that offices are vacant; the timing of elections of officers; the taking of disciplinary actions by the administrator; the termination of employment of employees of the C&G Division and its branches; and the making of an alteration of the rules of the C&G Division.

327 By s 323C(1) as soon as practicable after a scheme is determined under s 323B(1) the General Manager of the Fair Work Commission ("the FWC") must appoint a person to be the administrator of the scheme. By s 323F: a scheme determined under s 323B(1); any action taken under the scheme; and an instrument made under s 323C "have effect despite anything in this Act, Part 2-4 of the Fair Work Act or the rules of the CFMEU or a branch, division or part of the CFMEU".

328 Section 323H(1) provides that s 323H applies in relation to an alteration of the rules of the C&G Division under a scheme determined under s 323B(1). By s 323H(3) the administrator must, within 35 days after the alteration is made, or any longer period allowed by the General Manager of the FWC, lodge with the FWC a notice setting out particulars of the alteration and by s 323H(4) the notice must contain a declaration, signed by the administrator, that the alteration was

made in accordance with the scheme and that the particulars set out in the notice are true and correct to the best knowledge and belief of the administrator. By s 323H(6) the alteration does not take effect unless particulars of the alteration have been lodged with the FWC as required by s 323H(3) and (4) and the General Manager of the FWC has certified that, in the General Manager's opinion, the alteration: has been made in accordance with the scheme; complies with and is not contrary to the FWRO Act, the Fair Work Act, modern awards and enterprise agreements; and is not otherwise contrary to law. By s 323H(7), if so certified, the alteration takes effect on the day of certification.

329 Section 323J provides that "[e]xcept to the extent (if any) specified otherwise in a scheme determined under [s 323B(1)], costs of the administration, including costs incurred by the administrator in acting under the scheme and this Act, are to be borne by the CFMEU".

330 Section 323K includes these provisions:

"(1) While the Construction and General Division and its branches are under administration, the administrator:

- (a) has control of the property and affairs of the Division and its branches; and
- (b) may manage that property and those affairs; and
- (c) may dispose of any of that property; and
- (d) may perform any function, and exercise any power, that the Division or its branches, or any officers of the Division or its branches, could perform or exercise if it were not under administration.

...

(5) In performing functions and exercising powers as administrator, the administrator must:

- (a) be satisfied the administrator is acting in the best interests of the members of the Construction and General Division and its branches; and
- (b) have regard to the objects of the CFMEU as defined in the rules of the CFMEU at the commencement of section 323A, so far as they are lawful."

331 By s 323M(1) and (2) respectively the administrator is entitled to receive remuneration for necessary work properly performed by the administrator in

relation to the administration and the remuneration is to be paid from the funds of the CFMEU.

332 Division 2 of Pt 2A of Ch 11 contains provisions concerning persons removed from their office in the C&G Division as a result of a scheme determined under s 323B(1). These persons become subject to s 177A of the Fair Work Act, which complements the provisions of Div 2 of Pt 2A of Ch 11 of the FWRO Act (ss 323MA-323ME), preventing such persons from becoming a candidate for election to a registered organisation or a branch of a registered organisation or being appointed to an office in such an organisation or branch without first having obtained a certificate, which may be granted by the FWC if satisfied that the removed person is a fit and proper person to hold office in a registered organisation.

333 Division 3 of Pt 2A of Ch 11 concerns other matters relating to the administration of the C&G Division including s 323S(1), which provides as follows:

"If the operation of this Part, or an instrument made under this Part, would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) from a person otherwise than on just terms (within the meaning of that paragraph), the Commonwealth is liable to pay a reasonable amount of compensation to the person."

334 Before and after the enactment of Pt 2A of Ch 11, the FWRO Act contained both Pt 3 of Ch 2 and Pt 2 of Ch 11.

335 In Pt 3 of Ch 2, s 28(1) enables an organisation or person interested, or the Minister, to apply to the Federal Court for an order cancelling the registration of an organisation on the ground, amongst other things, that the conduct of the organisation (in relation to its continued breach of a modern award, an order of the FWC or an enterprise agreement, or its continued failure to ensure that its members comply with and observe a modern award, an order of the FWC or an enterprise agreement, or in any other respect) or a substantial number of the members of the organisation (in relation to their continued breach of a modern award, an order of the FWC or an enterprise agreement, or in any other respect) "has prevented or hindered the achievement of Parliament's intention in enacting this Act (see section 5) or of an object of this Act or the Fair Work Act". Section 28(3) vests power in the Federal Court to order the cancellation of the registration of a registered organisation and s 29 vests power in the Federal Court to defer doing so and to make certain alternative interim orders. Section 32 regulates the consequences of cancellation of the registration of a registered organisation.

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Part 2 of Ch 11 includes s 323, which states in part as follows:

"(1) An organisation, a member of an organisation or any other person having a sufficient interest in relation to an organisation may apply to the Federal Court for a declaration that:

(a) a part of the organisation, including:

(i) a branch or part of a branch of the organisation; or

(ii) a collective body of the organisation or a branch of the organisation;

has ceased to exist or function effectively and there are no effective means under the rules of the organisation or branch by which it can be reconstituted or enabled to function effectively; or

(b) an office or position in the organisation or a branch of the organisation is vacant and there are no effective means under the rules of the organisation or branch to fill the office or position;

and the Court may make a declaration accordingly.

(2) Where the Court makes a declaration under subsection (1), the Court may, by order, approve a scheme for the taking of action by a collective body of the organisation or a branch of the organisation, or by an officer or officers of the organisation or a branch of the organisation:

(a) for the reconstitution of the branch, the part of the branch or the collective body; or

(b) to enable the branch, the part of the branch or the collective body to function effectively; or

(c) for the filling of the office or position.

...

(4) The Court must not make an order under this section unless it is satisfied that the order would not do substantial injustice to the organisation or any member of the organisation.

- (5) The Court may determine:
 - (a) what notice, summons or rule to show cause is to be given to other persons of the intention to make an application or an order under this section; and
 - (b) whether and how the notice, summons or rule should be given or served and whether it should be advertised in any newspaper.
- (6) An order or direction of the Court under this section, and any action taken in accordance with the order or direction, has effect in spite of anything in the rules of the organisation or a branch of the organisation.
- (7) The Court must not under this section approve a scheme involving provision for an election for an office unless the scheme provides for the election to be held by a direct voting system or a collegiate electoral system."

Infringement of the implied freedom of political communication?

Aspects of the evolution of the implied freedom

337

The implication of a freedom of political communication into the *Constitution* has been conceived of as an essential, necessary or indispensable consequence of "the principle of responsible government – the system of government by which the executive is responsible to the legislature" and has been said to be "not merely an assumption upon which the actual provisions are based ... [but] an integral element in the Constitution".⁴⁸³ The conception of the protected freedom of political communication has evolved over time. The protected freedom of political communication has always been understood to be "an immunity consequent on a limitation of legislative power",⁴⁸⁴ curtailing the exercise of legislative and executive power, and not any form of personal right. The implication has been described as a "freedom from legislative prohibition and burdensome interference", its "primary operation [being] to confine, as a matter of construction, the scope of the legislative powers conferred by s 51 of the

483 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 135. See also at 138-140; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 47-49; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559-560.

484 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 150.

Constitution".⁴⁸⁵ The boundary of the freedom, it has been said, is "variable" because "in the case of each law, it is necessary to ascertain the extent of the restriction, the nature of the interest served and the proportionality of the restriction to the interest served".⁴⁸⁶ While "essential to the maintenance of a representative democracy, [freedom of political communication] is not so transcendent a value as to override all interests which the law would otherwise protect".⁴⁸⁷ The protected freedom, accordingly, may be confined by the pursuit of other legitimate interests and the scope of the freedom in such cases "is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution".⁴⁸⁸

338 In respect of the test for invalidity of a law restricting political communication, Brennan J described such a law as valid if "the law is enacted to fulfil a legitimate purpose and the restriction is appropriate and adapted to the fulfilment of that purpose",⁴⁸⁹ this being a matter of degree and dependent on the particular circumstances.⁴⁹⁰ According to his Honour, to determine whether a law answers that description "it is necessary to consider the proportionality between the restriction which [the] law imposes on the freedom of communication and the legitimate interest which the law is intended to serve".⁴⁹¹ Mason CJ considered that "in determining whether that requirement of reasonable proportionality is satisfied, it is material to ascertain whether, and to what extent, the law goes beyond what is reasonably necessary or conceivably desirable for the achievement of the legitimate object sought to be attained and, in so doing, causes adverse consequences unrelated to the achievement of that object".⁴⁹² His Honour considered that "[i]f the restriction imposes a burden on free communication that

485 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 76. See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560.

486 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 150-151.

487 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 159.

488 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561.

489 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 50.

490 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 51; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 158-159.

491 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 157.

492 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 30-31.

is disproportionate to the attainment of the competing public interest, then the existence of the disproportionate burden indicates that the purpose and effect of the restriction is in fact to impair freedom of communication".⁴⁹³ His Honour distinguished between restrictions on the communication of ideas and information and restrictions on the modes of communication of ideas and information. In the former case, his Honour posited, a "compelling" justification for the restriction would be required because a restriction on ideas and information is a form of political censorship. In the latter case, his Honour considered that a restriction may be "more susceptible of justification".⁴⁹⁴ This posited calibration of the test for invalidity reflects the different nature of the possible restrictions on political communication. Deane and Toohey JJ also emphasised the importance of the character of the impugned law to its validity or invalidity. According to their Honours, a law "whose character is that of a law with respect to the prohibition or restriction of communications about government or governmental instrumentalities or institutions ('political communications') will be much more difficult to justify as consistent with the implication than will a law whose character is that of a law with respect to some other subject and whose effect on such communications is unrelated to their nature as political communications".⁴⁹⁵

339 Thereafter, in *Lange v Australian Broadcasting Corporation* Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ said that infringement of the protected freedom "will not invalidate a law enacted to satisfy some other legitimate end if the law satisfies two conditions. The first condition is that the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government ... The second is that the law is reasonably appropriate and adapted to achieving that legitimate object or end."⁴⁹⁶ So conceived, their Honours concluded, the protected freedom did not extend beyond "what is inherent in the text and structure of the Constitution".⁴⁹⁷

340 Subsequently, Gleeson CJ similarly drew a distinction between a law having as its "direct purpose" the restriction of political communication and a law

493 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143-144.

494 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143.

495 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 169.

496 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562.

497 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567.

having some other legitimate purpose that incidentally imposed a restriction on political communication. His Honour, adopting an earlier observation of Gaudron J, considered that a law in the first category would be valid "only if necessary for the attainment of some overriding public purpose". A law in the second category would not be invalid "simply because it can be shown that some more limited restriction 'could suffice to achieve a legitimate purpose'". Such a law would be valid provided it was reasonably appropriate and adapted to achieve its other legitimate purpose.⁴⁹⁸ McHugh J also considered that "the reasonably appropriate and adapted test gives legislatures within the federation a margin of choice as to how a legitimate end may be achieved at all events in cases where there is not a total ban on such communications".⁴⁹⁹

341 To the same effect, in *Wotton v Queensland*⁵⁰⁰ French CJ, Gummow, Hayne, Crennan and Bell JJ said that "[i]n answering the second *Lange* question, there is a distinction, recently affirmed in *Hogan v Hinch*,⁵⁰¹ between laws which, as they arise in the present case, incidentally restrict political communication, and laws which prohibit or regulate communications which are inherently political or a necessary ingredient of political communication. The burden upon communication is more readily seen to satisfy the second *Lange* question if the law is of the former rather than the latter description."⁵⁰²

342 Yet later, French CJ, Hayne, Crennan, Kiefel and Bell JJ characterised the second condition expressed in *Lange* as asking "whether a statutory provision is proportionate in the means it employs to achieve its object [which] may involve consideration of whether there are alternative, reasonably practicable and less restrictive means of doing so".⁵⁰³ Subsequently again, French CJ, Kiefel, Bell and Keane JJ, in applying *Lange*, explained the first condition of validity of a law restricting political communications (the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government) as focusing on the compatibility of both the object (or purpose) of the law and the means adopted to achieve that object (or purpose). Both object (or purpose) and means were described as subject to the requirement

498 *Coleman v Power* (2004) 220 CLR 1 at 31 [30]-[31], quoting *Levy v Victoria* (1997) 189 CLR 579 at 619. See also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 200 [40].

499 *Coleman v Power* (2004) 220 CLR 1 at 52-53 [100].

500 (2012) 246 CLR 1.

501 (2011) 243 CLR 506 at 555-556 [95]-[99].

502 *Wotton v Queensland* (2012) 246 CLR 1 at 16 [30].

503 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 556 [44].

of compatibility with the constitutionally prescribed system of representative and responsible government. If the law's object (or purpose) and the means the law used to achieve that object (or purpose) satisfied the compatibility test, the question remained whether the law was reasonably appropriate and adapted to advance that legitimate object (or purpose). This last step in the process, for their Honours, focused on the law being "proportionate" in the sense of being "justified as suitable, necessary and adequate in its balance", where: suitability involved the existence of a rational connection between the law and its object (or purpose); necessity involved a lack of any "obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom"; and adequacy in balance involved "a value judgment, consistently with the limits of the judicial function".⁵⁰⁴

343 The label "structured proportionality" has been attached to this approach to the second aspect of the *Lange* test.⁵⁰⁵ From inception, this approach, in explaining and giving substance to the concept of a law being reasonably appropriate and adapted to advance its constitutionally legitimate purpose, has been described as: "an analytical tool rather than as a doctrine";⁵⁰⁶ having "evident utility as a tool";⁵⁰⁷ and not "the only criterion by which legislation that restricts a freedom can be tested".⁵⁰⁸ Given its essential character as explanatory of when a law may be considered to be reasonably appropriate and adapted to advance its constitutionally legitimate purpose,⁵⁰⁹ no description of the analysis which structured proportionality involves can or should be understood as requiring formulaic recitation of each of its three elements, still less recitation of the labels by which these elements have been described (suitability, necessity, and adequacy in balance).⁵¹⁰ Ultimately, "[w]hichever expression is used [reasonably appropriate

504 *McCloy v New South Wales* (2015) 257 CLR 178 at 193-195 [2]. cf (2015) 257 CLR 178 at 222 [98], 238-239 [150]-[154], 258-259 [220]-[222], 264-265 [243]-[245], 267-270 [251]-[255], 280-282 [306]-[311].

505 *McCloy v New South Wales* (2015) 257 CLR 178 at 236-237 [146].

506 *McCloy v New South Wales* (2015) 257 CLR 178 at 215 [72].

507 *McCloy v New South Wales* (2015) 257 CLR 178 at 215 [73].

508 *McCloy v New South Wales* (2015) 257 CLR 178 at 215-216 [74].

509 *McCloy v New South Wales* (2015) 257 CLR 178 at 194-195 [2]; *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 23-24 [48].

510 *Babet v The Commonwealth* [2025] HCA 21 at [49].

and adapted or proportional], what is important is the substance of the idea it is intended to convey".⁵¹¹

344 Nor, of itself, is structured proportionality inconsistent with calibrating the degree of scrutiny to the purpose of the law and the means the law uses to achieve its purpose. There is a manifest difference between (on the one hand) a law the direct and immediate purpose of which is to prohibit or restrict certain political communications which uses direct and immediate means to achieve the prohibition or restriction and (on the other hand) a law the direct and immediate purpose of which is to achieve some legitimate purpose compatible with our system of representative and responsible government which merely incidentally restricts freedom of political communication by some remote and indirect means.⁵¹² No doubt there will be laws between these two extremes but the calibration of the degree of scrutiny to the essential character of the law is an obvious available judicial technique to ensure that the freedom the courts protect is no more than is necessary to enable "the effective operation of that system of representative and responsible government provided for by the Constitution".⁵¹³

345 Further resolution of these streams of thought, their common sources, confluences and divergences, is not required in the present case. The weight of the plaintiffs' arguments rested principally on the alleged illegitimate purpose of Pt 2A of Ch 11 to restrict the C&G Division's political communications and secondarily on the alleged lack of justification for that restriction. If Pt 2A of Ch 11 restricts the C&G Division's freedom of political communication, the twofold inquiry from *Lange* involves determining, first, if Pt 2A of Ch 11 has a legitimate constitutional purpose (that is, an object or end compatible with the maintenance of the constitutionally prescribed system of representative and responsible government) and, second, whether Pt 2A of Ch 11 is reasonably appropriate and adapted to achieving that legitimate purpose, object or end.

511 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 197 [32].

512 Compare *Unions NSW v New South Wales* (2013) 252 CLR 530 at 553 [34], *Tajjour v New South Wales* (2014) 254 CLR 508 at 575 [132], *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 24 [49] and *Tajjour v New South Wales* (2014) 254 CLR 508 at 580-581 [151]-[152], *McCloy v New South Wales* (2015) 257 CLR 178 at 238 [152], *Brown v Tasmania* (2017) 261 CLR 328 at 375-379 [156]-[165].

513 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561.

Nature and extent of restriction on freedom of political communication

346 To ascertain the nature and extent of any restriction on freedom of political communication that Pt 2A of Ch 11 imposes "in its terms, operation or effect",⁵¹⁴ this case requires only a straightforward comparison between the capacity of the C&G Division to engage in political communications to achieve the CFMEU's political objects before and after the enactment of Pt 2A of Ch 11.⁵¹⁵

347 The position before the enactment of Pt 2A of Ch 11 and the placing of the C&G Division under administration as provided for in the provisions of that Part was simple. Relevantly, and as recorded in the special case, the C&G Division: contributes by far the most revenue of any Division to the CFMEU; constitutes over 76% of the financial members of the CFMEU; and has the greatest voting power within the CFMEU. The C&G Division, acting through officers elected or appointed in accordance with the C&G Division Rules, was able to "[t]ake such steps as it shall consider necessary to carry out all or any of the objects" of the CFMEU including by the full suite of lawful political communications (including fund-raising, political donations, supporting and opposing parties, supporting and opposing candidates, advertising, lobbying, demonstrating, and otherwise engaging in political discourse as the elected and appointed officers of the C&G Division saw fit). Through the decisions of its elected and appointed officers, the C&G Division could engage in these political communications by the application of its property and funds in accordance with the C&G Division Rules. By this means, the C&G Division, by the power of association, could "build and assert political power".⁵¹⁶

348 This capacity of the C&G Division to engage in political communications as decided upon by C&G Division officers appointed and elected in accordance with the C&G Division Rules included that those officers, by reason of their election or appointment in accordance with the C&G Division Rules, in both form and substance, represented or could be taken to represent the collective will of the members of the C&G Division. It therefore could be taken that the political activities of the C&G Division by, or at and under the direction of, those officers was collective action by and on behalf of the C&G Division and its members in their collective capacity. The importance of this representative status of officers appointed and elected in accordance with the C&G Division Rules to the legitimacy of their decisions as a manifestation of the collective will of the C&G

514 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567.

515 *cf Mulholland v Australian Electoral Commission* (2004) 220 CLR 181; *Ruddick v The Commonwealth* (2022) 275 CLR 333.

516 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 139, quoting Cox, *The Court and the Constitution* (1987) at 212.

Division, and of the capacity of members to influence such elected and appointed officials in their decision-making, is not to be under-estimated.

349 As recorded in the special case: the CFMEU is one of the 10 largest registered organisations under the FWRO Act, having some 126,063 members; and the "CFMEU officers found to have breached the Industrial Laws since 2019 included some officeholders of the C&G Divisional Executive and of every C&G Divisional Branch immediately before" the commencement of the Scheme. The special case also records that the CFMEU has a lengthy and extensive history of engaging in political activities and political communications including: lobbying political parties, elected representatives, and candidates; supporting the re-election of political parties and candidates; holding rallies for the purpose of pressuring political parties in relation to particular public policy positions; running campaigns for legislative reform in respect of particular issues (eg, introducing industrial manslaughter as a criminal offence in each State and Territory, banning the use, importation and manufacture of engineered stone in Australia, opposing the establishment of the Australian Building and Construction Commission and the Building Code, managing the housing crisis, and securing Australian jobs); publishing political communications; and working or affiliating with other unions and employee associations to political ends.

350 By Pt 2A of Ch 11 of the FWRO Act placing the C&G Division under administration, and the consequential provisions of Pt 2A, this representative decision-making capacity and representative collective action capacity has been removed from the elected and appointed officers of the C&G Division and placed into the hands of the administrator, a person appointed by mandate external to the C&G Division Rules and who, accordingly, does not have the status of a representative of the collective will of the members of the C&G Division.

351 The relevant point is not that one individual (the administrator) now stands in the shoes of several individuals (the officers of the C&G Division) who previously managed the affairs and controlled the property of the CFMEU. Neither the CFMEU nor the C&G Division is analogous to a corporation by whom executive officers are employed. Nor is the point that the elected and appointed officers of the C&G Division change over time, with the appointment of an administrator constituting but another change in control of the C&G Division. The relevant point is that, but for Pt 2A of Ch 11 and the placing of the C&G Division under administration, all officers would continue to be elected or appointed in accordance with the C&G Division Rules. By being so elected and appointed under the C&G Division Rules, those officers were (and but for the administration would have continued to be) a representative manifestation of the collective will of the members of the C&G Division. The placing of the C&G Division under administration and the appointment to it of an administrator did not merely change the governance or management of the C&G Division from several individuals to one individual. It involved the externally mandated appointment of a person to all positions of governance and management of the C&G Division other than in

accordance with the C&G Division Rules. Such a person, by definition, is not and can never be a representative manifestation of the collective will of the members of the C&G Division. What has been lost by the members and the C&G Division is control of the Division's representation in accordance with the C&G Division Rules. This loss is unavoidable and not ameliorable. Further, one consequence of this loss – the loss of that means for the C&G Division to communicate the collective will of its members, be it by political donations, advertising, or other communications, after the placing of the C&G Division under administration – is one of substance and will continue for a period of up to five years.

352 The inherent and inevitable impact on the C&G Division's capacity to engage in political communication of placing the C&G Division under administration is in no way undone or ameliorated by the capacity of individual members of the C&G Division to engage in political communications, either individually or in some form of new affiliation with each other. So much is manifest from the first stated object of the CFMEU, to "uphold the right of combination of labour". The very assertion of such a "right" is a political statement. It is a political statement expressing the existence of a fundamental difference between a "right" of employees to combine as a collective in their dealings with employers and a "right" of individual employees to deal with their employers. That there is such a fundamental difference cannot be gainsaid – recognition of the existence of this difference and its social, economic and legal importance is the reason for Australia's industrial relations system.

353 Nor can C&G Division ex-officers, officers or any member of the C&G Division make individual or collective political communications *as* the C&G Division. The C&G Division now being in the control of the administrator, whatever individual or collective political communications ex-officers, officers or members may choose to make they will not be communications by or on behalf of the C&G Division.

354 Accordingly, the capacity that the C&G Division had before being placed under administration was for the officers elected or appointed in accordance with the C&G Division Rules to engage in political communications using the resources of the C&G Division as they decided fit to best achieve the objects of the CFMEU as a manifestation of the collective will of the members of the C&G Division. While the CFMEU's objects remain, placing the C&G Division under administration removes that capacity. By force of the administration under Pt 2A of Ch 11, it is now the decision of the administrator, not those officers elected and appointed in accordance with the C&G Division Rules, to decide if, when and how to engage in political communications using the resources of the C&G Division as the administrator decides fit to best achieve the objects of the CFMEU.

355 This is not to say, however, that the administrator's performance of functions and exercise of powers is unconfined. The constraint on the administrator's performance of functions and exercise of powers is that, by

s 323K(5), the administrator must be satisfied the administrator is acting in the best interests of the members of the C&G Division and have regard to the objects of the CFMEU as defined in the CFMEU Rules at the commencement of s 323A so far as they are lawful.

356 What is the true nature of this constraint? For one thing, the administrator's exercise of control over the property and affairs of the C&G Division in s 323K(1) is subject to the constraint as expressed in s 323K(5).

357 On the proper construction of the statutory provisions, the constraint in s 323K(5) applies to the performance of every function and the exercise of every power by the administrator. The administrator, for example, cannot comply with s 323K(5) by weighing acts in the course of the administration one against the other, some in the best interests of members of the C&G Division and others not, and decide that the overall balance is in the best interests of members. With respect to each performance of a function and each exercise of a power the administrator must be satisfied the performance or exercise is in the best interests of members of the C&G Division and the administrator must reach that state of satisfaction having regard to the objects of the CFMEU.

358 While it is for the administrator to reach the requisite state of satisfaction about each and every one of the administrator's decisions (including decisions not to act), any such state of satisfaction also must be such as could be formed by a reasonable person correctly understanding the law under which the administrator operates. Such a state of satisfaction, therefore, cannot be arbitrary or be based on the consideration of matters which, upon the proper construction of Pt 2A of Ch 11, the Scheme, and the lawful objects of the CFMEU defined in the CFMEU Rules before the commencement of s 323A, are irrelevant. The state of satisfaction must be one reached "according to the rules of reason and justice, not according to private opinion ... according to law, and not humour".⁵¹⁷ Accordingly, if the state of satisfaction reached by the administrator for a decision in the course of the administration is "reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the [state of satisfaction] has not been formed. In that event the basis for the exercise of power is absent, just as if it were shown that the [state of satisfaction] was arbitrary, capricious, irrational, or not bona fide."⁵¹⁸

517 *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 431, referring to *Metropolitan Gas Co v Federal Commissioner of Taxation* (1932) 47 CLR 621 at 632 (quoting *Sharp v Wakefield* [1891] AC 173 at 179).

518 *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432. See also *Water Conservation and Irrigation Commission (NSW) v Browning* (1947)

359 As noted, in reaching the required state of satisfaction that the administrator is acting in the best interests of the members of the C&G Division, the administrator must have regard to the objects of the CFMEU as defined in the CFMEU Rules (so far as they are lawful) at the commencement of s 323A. The temporal qualification here is important. It is the objects as at that time (23 August 2024) which are relevant. No subsequent amendment of the CFMEU Rules affects those objects. It is those objects to which the administrator must have regard in deciding what actions are in the best interests of the C&G Division's members. Those objects, accordingly, are to be a centrally relevant consideration in and focal point of the administrator's decision-making processes.⁵¹⁹

360 As also noted, the objects of the CFMEU are overtly political and achievable by political communications. How, in performing a function or exercising a power, is the administrator to be satisfied that the administrator is acting in the best interests of members of the C&G Division having regard to the objects of the CFMEU when the administrator has not been elected or appointed by members to any office of the C&G Division in accordance with the C&G Division Rules? This question needs to be answered to enable the nature and extent of the restriction that the enactment of Pt 2A imposes on the C&G Division's freedom of political communication to be known. The answer to this question is in the meaning and operation of the legislative provisions construed in light of the fact that the administrator's exercise of control over the property and affairs of the C&G Division in s 323K(1), subject to the constraint in s 323K(5), is to be read in accordance with s 15A of the *Acts Interpretation Act 1901* (Cth) (that "[e]very Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power").

361 First, Pt 2A of Ch 11 contains no provision which expressly or implicitly prevents or restricts the administrator from applying resources of the C&G Division to the making of political communications. To the contrary, it contains s 323K(5), which imposes on the administrator the duty of the required state of satisfaction (best interests of the members) and the duty of consideration (the objects of the CFMEU) in respect of the performance of every function and the exercise of every power in the administration.

74 CLR 492 at 496, 498, 504-505; *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360.

519 *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329; *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 274 CLR 565 at 601 [113].

362 Second, as pointed out above, the objects of the CFMEU which apply under
s 323K(5) are those which existed before the administration. This means those
objects are effectively entrenched. Those objects remain unaffected by any
alteration of the C&G Division Rules under s 323H.

363 Third, any tension between s 323F and s 323K(5) must also be resolved in
favour of s 323K(5). By this, although by s 323F the Scheme and any action taken
under it "have effect" despite anything in the Fair Work Act, the FWRO Act, the
CFMEU Rules and the C&G Division Rules, that does not mean that the
administrator, in taking action under the Scheme, can avoid complying with
s 323K(5) in respect of the performance of every function and the exercise of every
power. Each and every action taken under the Scheme involves the performance
of a function and the exercise of a power in respect of which the administrator must
comply with s 323K(5). Provided the performance of the function and the exercise
of the power do so comply then the resulting action will have effect as provided
for in s 323F.

364 Fourth, as the Scheme cannot rise higher than its source in s 323B, no
provision of the Scheme can affect the operation of s 323K(5).

365 Fifth, although the administrator, as a person appointed by external mandate
and not elected or appointed in accordance with the C&G Division Rules, is not
and cannot be a representation of the collective will of the members of the C&G
Division, s 323B(3) identifies matters for which a scheme must provide. These
matters include: in s 323B(3)(d), the timing of elections of officers; in
s 323B(3)(i), the delegation by the administrator of the administrator's functions
and powers; in s 323B(3)(j), the engagement or employment of persons by the
administrator to assist in performing the administrator's functions; and in
s 323B(3)(l), matters ancillary or incidental to the other matters in s 323B(3).
Together with the functions of the administrator under s 323K(1) and the operation
of s 323F, these provisions ensure that the administrator has practical and legal
capacity for the administrator to ascertain the will of the majority of members of
the C&G Division in respect of such matters as the administrator considers
appropriate, including the making of political communications.

366 Sixth, nothing in Pt 2A of Ch 11 prevents members of the C&G Division
individually or collectively, as they see fit, from informing the administrator of
steps they wish the administrator to take to ascertain the will of the majority of
members of the C&G Division in respect of such matters as they consider
appropriate, including the making of political communications.

367 Seventh, s 323K(5), at the least, would operate to require the administrator,
on the receipt of any such request, to consider the request in good faith and
reasonably and to be satisfied that the administrator's response to the request is in
the best interests of the members having had regard to the objects of the CFMEU.
The administrator could not, in compliance with s 323K(5), refuse to consider any

such request. Nor could the statutory provisions be construed as enabling the administrator to disregard any such request, given the operation of s 15A of the *Acts Interpretation Act*.

368 Section 15A of the *Acts Interpretation Act* cannot, however, change the ultimate fact that it is for the administrator to decide in good faith and on a reasonable and otherwise lawful basis in accordance with the criteria in s 323K(5) whether the C&G Division should make a political communication and, if so, the timing and nature of that communication. Accordingly, while Pt 2A does not in terms prevent the C&G Division from engaging in political communications, in its legal and practical operation it significantly restricts the C&G Division's capacity to do so by vesting in the administrator both the control of all of the C&G Division's affairs and property and a wide (albeit not unfettered) decision-making capacity about the best interests of the members of the C&G Division having regard to the objects of the CFMEU.

369 It is therefore necessary to consider the twofold test for validity established in *Lange*.⁵²⁰

Ends, objects or purposes of Pt 2A

370 Legislative ends, objects or purposes are ascertained from the text and operation of the law construed objectively and in context, the relevant focus, however, being that which the law's provisions in fact serve to achieve. The end, object or purpose of a law, therefore, is "collected from the instrument in question, the facts to which it applies and the circumstances which called it forth".⁵²¹ The ascertaining of a law's end, object or purpose does not involve consideration of the subjective motives of legislators or of the legislature as a collective for passing the enactment. That is, the subjective reasons why legislators, individually or collectively, passed an enactment are immaterial to the ascertainment of a law's end, object or purpose.⁵²²

520 (1997) 189 CLR 520 at 561-562.

521 *Stenhouse v Coleman* (1944) 69 CLR 457 at 471.

522 eg, *R v Barger* (1908) 6 CLR 41 at 75; *Australian Textiles Pty Ltd v The Commonwealth* (1945) 71 CLR 161 at 178; *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 273; *Richardson v Forestry Commission* (1988) 164 CLR 261 at 311. See also *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at 573 [18]; *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at 254 [83], quoting *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 561 [12].

371 Section 15A of the *Acts Interpretation Act* does not operate on legislative purpose. That is, s 15A does not have the effect of transforming a legislative purpose that exceeds power into a legislative purpose that is within power. Section 15A operates only on the interpretation and meaning of statutory provisions.

372 In the Second Reading Speech for the *Fair Work (Registered Organisations) Amendment (Administration) Bill 2024* (Cth), the Minister for Employment and Workplace Relations tabled the Bill and explained that "[s]ince July 2024, serious allegations have come to light about the conduct of some members and associates of the Construction and General Division of the Construction, Forestry and Maritime Employees Union". The Minister said that the "Australian government takes these allegations seriously. There is no place for criminality or corruption in the construction industry, and bullying, thuggery and intimidation are unacceptable in any workplace". After noting that the General Manager of the FWC had applied to the Federal Court of Australia for a declaration that the majority of branches of the C&G Division were no longer able to function effectively, including in the interests of members, and that there were no effective means under the relevant rules to address the situation,⁵²³ an application in which the Minister had intervened to support, the Minister said that the government had "made clear that, if the matter was not resolved before parliament returned, we would introduce legislation to facilitate administration, if it was determined to be in the public interest". The Minister expressed the "government's firm view that enabling administration, not deregistration, is the strongest action to take in these circumstances" as deregistration of the C&G Division would not stop the CFMEU from participating in a range of industrial activities whereas placing the C&G Division into administration "would maintain the regulation and additional oversight that applies to registered organisations and ensure the division acts in the best interests of its members". According to the Minister, the Bill included "strong powers" for the administrator and would allow the administrator to take action necessary to restore the effective management and operation of the C&G Division, giving the administrator control of the C&G Division's property and affairs.⁵²⁴

373 The related Explanatory Memorandum also recorded the background to the Bill as the making of serious allegations of corruption, criminal conduct and other serious misconduct including bullying and harassment and general disregard for workplace laws by some officials and associates of the C&G Division, as well as the General Manager of the FWC's view that the majority of branches of the C&G Division were no longer able to function effectively. The Explanatory Memorandum further stated that the General Manager's application to the Federal

523 In accordance with s 323(1) of the FWRO Act, enabling the Court to make orders as provided for in s 323(2) of that Act.

524 Australia, Senate, *Parliamentary Debates* (Hansard), 12 August 2024 at 2698.

Court included information that, "since 2003, the CFMEU has been the subject of findings of contraventions of federal workplace laws on more than 1,500 occasions (plus 1,100 contraventions by its officeholders, employees, delegates and members) in approximately 213 proceedings, resulting in total penalties ordered against the CFMEU of at least \$24 million plus at least \$4 million ordered against its office holders, employees, delegates and members". According to the Explanatory Memorandum, since July 2024, the General Manager of the FWC had also become aware of other alleged criminal and serious misconduct by officers of the C&G Division, including dealings with and involvement in the C&G Division's affairs of persons with criminal associations. The Explanatory Memorandum stated that the "legislative amendments in the Bill seek to protect the interests of members of the [C&G Division], and if a scheme of administration is determined, would seek to help return the [C&G Division] to a position where it is democratically controlled by those who promote and act in accordance with Australian laws, including workplace laws" and that the "proposed legislation is necessary to end ongoing dysfunction within the [C&G Division] and to ensure it is able to operate effectively in the interests of its members".⁵²⁵ A Revised Explanatory Memorandum taking into account amendments made to the Bill in the Senate after its introduction recorded the same information.

374 As disclosed in this extrinsic material, part of the context of the enactment of Pt 2A of Ch 11 is that, before its enactment, the FWRO Act included Pt 3 of Ch 2 and Pt 2 of Ch 11. According to the Minister's Second Reading Speech, while an application to the Federal Court for a declaration under s 323(1) had been filed by the General Manager of the FWC, the government's view was that administration was the strongest action as it would maintain the regulation and oversight of the C&G Division as part of a registered organisation.

375 Another part of the context of the enactment of Pt 2A of Ch 11 disclosed in the extrinsic material is that the objective circumstances which called forth the legislation included both: the record of the CFMEU and its officers, including officers of the C&G Division, on an unprecedented scale of repeated contraventions of industrial legislation; and the seriousness and extent of allegations against members of the C&G Division, including criminality, corruption, bullying, thuggery and intimidation, which evidenced perceived dysfunction and necessitated action to return to the C&G Division the capacity to function effectively, including in the interests of members and in accordance with Australian laws, including workplace laws.

376 The plaintiffs relied on other documents as part of the context relevant to the enactment of Pt 2A of Ch 11 and related provisions including parts of the debates in Parliament and correspondence, including from the administrator before

525 Australia, Senate, *Fair Work (Registered Organisations) Amendment (Administration) Bill 2024*, Explanatory Memorandum at 2-4 [7]-[11].

his appointment to the effect that, if appointed, he "intend[ed] to conduct a lawful Administration" and to vary the C&G Division Rules to "prohibit the making of party-political donations or the funding of party-political campaigns". The compatibility of those two expressed objectives is not for determination in this matter. It is sufficient to refer to some aspects of the Parliamentary debates. During extensive debate over several days in the Senate, the Minister said that the government had agreed "that the scheme of administration that would be applied under this legislation would ban donations to any political party for the period of the administration", which had been confirmed in a letter. Another Senator also said that the government had committed to "ensuring political donations and political expenditure from the CFMEU are banned during the period of the administration". In the House of Representatives there was reference to the proposed administrator under the legislation having confirmed that during the period of administration the C&G Division would not "engage in party politics ... donations, positions at political party conferences, and promotions of particular candidates".

377 It may be accepted that legislative purposes are not to be divined from private communications. Parliamentary debates, however, occur in the public domain. Further, once it is accepted that the objective circumstances which called forth the legislation are relevant to the ascertainment of legislative purpose, it must also be accepted that ensuring that, for the period of the administration, the C&G Division would not engage in political activities, including political communications, formed part of those objective circumstances. To characterise this objective as a mere subjective reason that some individual legislators or the legislature as a collective wanted to enact Pt 2A may be convenient but is not convincing. There is no justification to accept one publicly stated legislative purpose – to restore functionality to the C&G Division – and yet to ignore another publicly stated legislative purpose – to ensure that the C&G Division would be prevented from political activity including political communications during the period of administration. No doubt individual legislators may have had different reasons or motives for wanting to achieve this objective. It is those reasons and motives which are to be disregarded, not the objective itself.

378 It may also be accepted that there is no express statement of this objective of Parliament in enacting Pt 2A of Ch 11 to be found in the provisions of the Part. This absence, however, applies across the board. There is also no statement of Parliamentary objective in Pt 2A to: (a) provide an effective and quick response to allegations of serious and extensive criminal and unlawful conduct and mismanagement by officers of the C&G Division; or (b) swiftly restore the effective management and operation of the C&G Division. No more can be drawn from legislative silence about one end, object or purpose of a law than any other end, object or purpose.

379 It is also not to the point that the legislation was not amended to ensure that the end, object or purpose of preventing the C&G Division from engaging in

political communications during the administration could be achieved. Given the nature of the CFMEU and the C&G Division, this end, object or purpose is (and always was) inherent in the legislative means of placing the C&G Division under administration by which control of its property and affairs would be removed from those responsible for such control under the CFMEU Rules and C&G Division Rules and vested in an administrator. The legislation was not made in a vacuum decontextualised from the essential characteristics of the CFMEU of which the C&G Division forms part. The CFMEU, as an association of employees, the objects of which include upholding the "right of combination of labour", to "do all things conducive to the welfare and organisation of the working class", to secure legislation for the well-being of members, to "take part in any or all questions ... affecting or involving the wages and conditions of labour", and to raise political levies, make political donations and affiliate with political parties, is a political body, collectivised to achieve collective political ends. To remove control of the affairs and property of the C&G Division from those who exercise and deal with it in accordance with the CFMEU Rules and C&G Division Rules and give such control to an administrator inherently and inevitably affects the capacity of the C&G Division to engage in acts to achieve the CFMEU's political objects by means of political communications.

380 There should also be no doubt that Pt 2A of Ch 11, in its legal and practical operation, can achieve the end of preventing the C&G Division from engaging in political communications during the administration. While the administrator must act reasonably and comply with the law, as described above, the ultimate decision is for the administrator alone.

381 That placing the C&G Division under administration has this inherent and inevitable impact reinforces the conclusion that Pt 2A of Ch11 has several ends, objects or purposes. It should be unsurprising that legislation which in fact enables multiple material objectives to be achieved is to be characterised as having as its purposes the achievement of each of those objectives. It must be inferred from the context and text of Pt 2A of Ch 11 that it was intended to serve each of these objectives. The object of preventing the C&G Division from engaging in political communications while it is under administration cannot be characterised as a mere incidental consequence or effect of Pt 2A of Ch 11. Nor can it be characterised as an immaterial, tangential, subsidiary, ancillary, subservient or minor object of the Part. It must be characterised as an end, object or purpose of Pt 2A of Ch 11 which is itself material and substantial.

382 Accordingly, the ends, objects or purposes of Pt 2A of Ch 11 should be recognised to be: (a) providing an effective and quick response to allegations of serious and extensive criminal and unlawful conduct and mismanagement by officers of the C&G Division; (b) swiftly restoring the effective management and operation of the C&G Division; and (c) preventing the C&G Division from engaging in political communications while it is under administration.

Multiple/mixed ends, objects or purposes

383 For several reasons, the end, object or purpose of preventing the C&G Division from engaging in political communications is not compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

384 First, the C&G Division, and the CFMEU of which it forms part, is an association of employees of a kind which the Australian legal system presumes to exist and contemplates as existing to perform functions within our system of industrial relations. That is, the existence, objects and operations of the C&G Division, and the CFMEU of which it forms part, themselves form a legitimate part of the constitutionally prescribed system of representative and responsible government which the implied freedom of political communication protects.

385 Second, and consistently with this status of the C&G Division, and the CFMEU of which it forms part, nothing in their constitutive documents indicates any incompatibility between their existence, objects and operations and our constitutionally prescribed system of representative and responsible government.

386 Third, the other manifestly legitimate ends, objects or purposes of Pt 2A of Ch 11 (providing an effective and quick response to allegations of serious and extensive criminal and unlawful conduct and mismanagement by officers of the C&G Division and swiftly restoring the effective management and operation of the C&G Division) do not suggest any irresolvable incompatibility between the existence, objects and operations of the C&G Division, and the CFMEU of which it forms part, and our constitutionally prescribed system of representative and responsible government. To the contrary, the statutory scheme enacted for the purpose of regulating employee associations indicates that such compatibility is the norm, from which operations of the C&G Division, and the CFMEU of which it forms part, have deviated – as evidenced by the number of contraventions of industrial legislation by the CFMEU and its officers and the extent and seriousness of the allegations of criminal or improper conduct by the CFMEU and officers.

387 There can be no doubt that if preventing the C&G Division from engaging in political communications was the sole substantial or material end, object or purpose of Pt 2A of Ch 11, the Part would be invalid by operation of the first element of the *Lange* test. A law which has as its sole purpose preventing political communications by an association the existence, objects and operations of which are themselves lawful cannot be compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. This proposition, however, does not answer the question of validity if preventing the C&G Division from engaging in political communications is not the sole substantial or material end, object or purpose of Pt 2A but, rather, is one only of three substantial or material ends, objects or purposes of the provisions, the other two being legitimate purposes.

388 What approach should be taken to the validity or invalidity of a law by reason of infringement of the implied freedom of political communication if the ends, objects or purposes of the law are several in number, one or more of which satisfies and one or more of which fails the first aspect of the *Lange* test? No previous authority has determined this issue. Nor is it to be assumed that when previous decisions have referred to the vitiating effect of *the* (meaning sole) purpose of a law that is incompatible with the maintenance of the constitutionally prescribed system of representative and responsible government, those cases also decided the question of the validity a law having more than one purpose where one purpose is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and another purpose is not so compatible.

389 It is convenient here to contrast the nature of the freedom of political communication, as a protection implied into the *Constitution* by reason of necessity, and express provisions of the *Constitution* such as s 116. Section 116 provides that the "Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth". To the extent that the relational "for" here indicates that s 116 prohibits the Commonwealth making *a* law for *a* purpose proscribed by the provision,⁵²⁶ a law which has as *a* purpose the establishing of any religion (etc) will be invalidated by s 116 whether it has other, constitutionally legitimate purposes or not. That is, it is the existence of the purpose impugned by s 116 which invalidates the law because it is the mere presence of that impugned purpose which contravenes s 116.

390 The freedom of political communication also differs from the express provision of s 92 of the *Constitution*, that "trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free". The now established construction of s 92 is that it protects interstate trade and commerce against "discriminatory burdens of a protectionist kind".⁵²⁷ In this context, the fact or effect of a discriminatory burden of a protectionist kind has been the essential touchstone of invalidity. Accordingly, "if a law, which may be otherwise justified by reference to an object which is not protectionist, discriminates against interstate trade or commerce in pursuit of that

526 *Krygger v Williams* (1912) 15 CLR 366; *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116; *Attorney-General (Vict) v Ex rel Black v The Commonwealth* (1981) 146 CLR 559; *Kruger v The Commonwealth* (1997) 190 CLR 1. See also Beck, "The Case against Improper Purpose as the Touchstone for Invalidity under Section 116 of the *Australian Constitution*" (2016) 44 *Federal Law Review* 505.

527 *Cole v Whitfield* (1988) 165 CLR 360 at 394.

object in a way or to an extent which warrants characterization of the law as protectionist, a court will be justified in concluding that it nonetheless offends s 92".⁵²⁸ The ends, objects or purposes of the law are relevant to its characterisation,⁵²⁹ but the existence of other, non-protectionist purposes will not save a law from invalidity if the law has a protectionist purpose and discriminates against interstate trade or commerce so that it can be characterised as a protectionist law.

391 The implied freedom of political communication may also be contrasted with the operation of Ch III of the *Constitution*, which vests the judicial power of the Commonwealth (including punishment) in courts. The test for infringement of Ch III by a law authorising the non-judicial detention of a person (ordinarily constituting punishment), which is whether the law is reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose,⁵³⁰ is similarly "ultimately directed to a single question of characterisation: whether the power to impose the detriment conferred by the law is properly characterised as punitive and therefore as exclusively judicial".⁵³¹

392 In contrast to these examples, where the constitutional prohibition is absolute and the test for validity applies accordingly, the implied constitutional protection of freedom of political communication is a brake on otherwise existing legislative and executive power. By reason of this nature of the implied freedom, its operation must be calibrated to no more than that which is necessary in each case for the effective operation of that system of representative and responsible government provided for by the *Constitution*. It follows from this that in circumstances where a law has multiple legislative purposes one of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government it can no more be assumed that, by operation of the implied freedom, the mere existence of another incompatible purpose of the law (in this case, preventing the C&G Division from engaging in

528 *Cole v Whitfield* (1988) 165 CLR 360 at 408.

529 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 471-472. See also *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 394 [178], 461-462 [422]-[424]; Simpson, "Grounding the High Court's Modern Section 92 Jurisprudence: The Case for Improper Purpose as the Touchstone" (2005) 33 *Federal Law Review* 445.

530 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1015 [39]; 415 ALR 254 at 264.

531 *Jones v The Commonwealth* (2023) 97 ALJR 936 at 947 [43]; 415 ALR 46 at 56. See also *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 344 [31]-[32].

political communications during the administration) has the consequence of invalidity, than it can be assumed that any effect of a law in restricting political communications has that consequence. As the protection of free political communication is not absolute, it being accepted that such freedom is not a transcendent value to which all other legitimate objects must yield, the existence of an illegitimate legislative purpose does not have the consequence of invalidity if there are also legitimate legislative purposes ascertainable and the law otherwise satisfies the twofold test in *Lange*. To conclude otherwise is not to perform a judicial duty of upholding the *Constitution*, but to enable the implied freedom of political communication to go further than necessary to protect the system of representative and responsible government embodied in the *Constitution*.

393

To explain this further, as has been said, the relevant context here is not the subjective purpose of legislators either individually or collectively. Accordingly, provided it can be said that each end, object or purpose of the legislation (legitimate and illegitimate) is material or substantial (in this context, these two concepts have the same meaning, and are intended to distinguish a legislative end, object or purpose of a law from a mere incidental effect of a law), there is no point in a search for a so-called dominant, substantial, motivating or causal (in the sense of "but for") purpose. No analogy can be drawn between a legislature enacting legislation it is otherwise empowered to enact (which has the effect of restricting political communications, and which therefore must be subjected to the twofold test in *Lange*) and an administrative decision-maker exercising a power for a purpose outside of the purposes for which the power was conferred. In the former case, the only relevant "purpose" is the objective legislative purpose (or purposes) which the law seeks to achieve. In the latter case, the relevant "purpose" is the motivating or actuating purpose of the decision-maker in making the decision. In the former case, the focus on purpose is required by the first limb of the test in *Lange* because the ultimate inquiry is whether the means adopted by Parliament to achieve a legitimate purpose of the law are reasonably appropriate and adapted to the achievement of that purpose and, accordingly, the relationship between the legitimate purpose and the means selected to achieve that purpose is part of the calibration of the test for the curtailment of legislative and executive power imposed by the implied constitutional freedom. In the latter case, the focus on purpose is required because there will be no power to exercise if the purpose of the exercise is not itself authorised by the legislation vesting the power in the decision-maker. Accordingly, in the former case and unlike in the latter case,⁵³² the existence of several purposes, some legitimate and some not under the first limb of the test in *Lange*, cannot and does not call for any consideration of the dominant, substantial, motivating or causal purpose of the legislature.

⁵³² eg, *Thompson v Randwick Corporation* (1950) 81 CLR 87 at 106; *Samrein Pty Ltd v Metropolitan Water Sewerage and Drainage Board* (1982) 56 ALJR 678; 41 ALR 467.

394 It follows that, in applying the first limb of the test in *Lange*, it is no part of the inquiry to attempt to divine whether, but for the illegitimate purpose, the legislature would or would not have enacted the legislation. As a brake on legislative power, the legislation to which the twofold test in *Lange* is to be applied is taken to be one that the legislature was otherwise empowered to and did enact. It is only if the legislation restricts political communication that the test in *Lange* is to be applied. The legislation will fail the first limb of the *Lange* test if its sole substantial or material end, object or purpose is not one which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. It will not fail the first limb of the *Lange* test if one or more of its substantial or material ends, objects or purposes is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. In such a case, it will be necessary to apply the second limb of the *Lange* test. In the application of that limb, the existence of the illegitimate purpose may be relevant. For example, if the consequence or effect of the law's illegitimate purpose is that the means the law uses to achieve its purposes go beyond what is reasonably necessary to achieve the legitimate purpose or purposes and a disproportionate burden on the freedom of political communication results from the means so doing, it may be that the law is not reasonably appropriate and adapted to the achievement of its legitimate purposes; but the existence of a purpose of a law which is incompatible with the maintenance of the constitutionally prescribed system of representative and responsible government does not necessarily result in the invalidity of that law. This approach ensures that the implied freedom, based as it is on a value that does not transcend all other potentially competing values, does not rise higher than its source.

Is Pt 2A reasonably appropriate and adapted to its legitimate purposes?

395 The distinction which Mason CJ drew in *Australian Capital Television Pty Ltd v The Commonwealth* between a restriction on the communication of ideas and a restriction on the mode of communication of ideas⁵³³ does not particularly resonate in this case. Part 2A of Ch 11 of the FWRO Act operates to restrict, and can operate to prevent, the political communications of the C&G Division. In this sense, it is a restriction on the communication of political ideas by the C&G Division rather than a restriction on the mode by which the C&G Division might communicate political ideas. As explained, however, the restriction on freedom of political communication is not by way of Pt 2A of Ch 11 directly prohibiting the administrator from enabling the C&G Division to engage in political communications during the administration. The restriction is an inevitable and inherent operational effect or consequence of the means adopted by Parliament to attain the legitimate objects of (a) providing an effective and quick response to allegations of serious and extensive criminal and unlawful conduct and

⁵³³ *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143.

mismanagement by officers of the C&G Division; and (b) swiftly restoring the effective management and operation of the C&G Division, that is, by the placing of the C&G Division under administration and the vesting in the administrator of control of the property and affairs of the C&G Division. Accordingly, although not a complete fit with the facts of this case, the (somewhat) greater resonance is from the observation of Deane and Toohey JJ in *Australian Capital Television* distinguishing between a law having the character of being with respect to the prohibition or restriction of political communications and a law with respect to some other subject and whose effect on such communications is unrelated to their nature as political communications.⁵³⁴ The fit between this observation and the present case is by no means perfect, however, because of the nature of the C&G Division as a Division of the CFMEU, the objects of which are essentially political and whose communications, therefore, are also essentially political.

396 The distinction, nevertheless, is helpful as it exposes that along the spectrum which Gleeson CJ identified in *Coleman v Power*, between (at one end) a law having as its direct purpose the restriction of political communication and (at the other end) a law having some other, legitimate object that incidentally imposes a restriction on political communication,⁵³⁵ Pt 2A of Ch 11 sits somewhere in the middle. The effect of Pt 2A of Ch 11 in restricting political communications is an inevitable consequence of the enactment of Pt 2A, but that consequence or effect is not merely an incident of the operation of the legislation. Given the nature of the CFMEU of which the C&G Division forms part, that consequence or effect is inherent in the transfer of control of the property and affairs of the C&G Division to an externally mandated person.

397 There should be no conceptual difficulty in accepting that in applying the second limb of the *Lange* test, the position of the law along the spectrum which Gleeson CJ identified is relevant to the calibration of the test, whether that calibration be described as attaching to the intensity of the review or the margin of choice which legislatures have in deciding the means to achieve the ends, objects or purposes of the legislation. It should also be apparent that, in this case, Pt 2A of Ch 11 can achieve the legitimate objectives of the legislation. In that sense, Pt 2A of Ch 11 is appropriate and adapted to those ends, because vesting control of the C&G Division's property and affairs in an externally mandated person enables that person to investigate the activities of the C&G Division and its officers, ascertain the actions which are required to swiftly restore the effective management and operation of the C&G Division, and take those actions. It follows that the issue is not whether Pt 2A of Ch 11 is appropriate and adapted to achieve its legitimate ends. It is. The question is whether it is *reasonably* appropriate and

534 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 169.

535 *Coleman v Power* (2004) 220 CLR 1 at 31 [30]-[31].

adapted to do so, having regard to the nature of the legitimate ends to be served and the nature and extent of the burden imposed on the freedom of political communication.

398 In evaluating this question whether Pt 2A of Ch 11 is reasonably appropriate and adapted to achieve its legitimate ends, in applying the second limb of the *Lange* test it is not for the courts to second-guess the circumstances which the Parliament identified as calling forth the legislation. The Parliament was confronted by circumstances of the CFMEU's repeated contraventions of industrial legislation on an unprecedented scale, along with serious allegations of the infiltration of the C&G Division by persons with criminal associations, and alleged serious criminality and corruption by some officers of the CFMEU. The Minister said the "Australian government takes these allegations seriously". The Parliament was entitled to take the allegations seriously. That the circumstances included allegations (rather than proof of the criminality and corruption the subject of the allegations) may be accepted. But that does not deny to the Parliament the capacity to respond effectively to the circumstances with which it was confronted. Courts are bound to convict and sentence or punish on proof; Parliament is not so bound in regulating the conduct of a registered organisation under the FWRO Act.

399 Part 2A of Ch 11 of the FWRO Act is an effective means of Parliament achieving its legitimate objects of (a) providing an effective and quick response to allegations of serious and extensive criminal and unlawful conduct and mismanagement by officers of the C&G Division; and (b) swiftly restoring the effective management and operation of the C&G Division. That the Parliament could have awaited the outcome of the application to the Federal Court by the General Manager of the FWC under s 323(1) of the FWRO Act may be accepted. That Parliament did not do so does not indicate that Pt 2A of Ch 11 is other than reasonably appropriate and adapted to its legitimate objects. Parliament also did not consider an application for the cancellation of the registration of the CFMEU under s 28 of the FWRO Act to be preferable to the enactment of Pt 2A of Ch 11. While these options were both available, the second limb of the test in *Lange* does not ask this Court to decide which option might have caused the least restriction on freedom of political communication. The question is whether the option Parliament did take, the enactment of Pt 2A of Ch 11, is reasonably appropriate and adapted to the legitimate objects of the Part. In determining that question, it may be accepted that the existence of an obvious and compelling alternative means to achieve the same objects, having a clearly less restrictive effect on freedom of political communication, may be relevant or determinative.⁵³⁶

400 In this case, there is no obvious and compelling alternative to the enactment of Pt 2A of Ch 11 to achieve the same objects, which would have had a clearly less restrictive effect on freedom of political communication. The Parliament was

⁵³⁶ eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568.

entitled to conclude that the objectives of (a) providing an effective and quick response to allegations of serious and extensive criminal and unlawful conduct and mismanagement by officers of the C&G Division and (b) swiftly restoring the effective management and operation of the C&G Division, in the face of the circumstances confronting Parliament, required the control of the C&G Division's property and affairs to be removed from the officers under whose governance the circumstances had arisen and vested in another person to enable the investigation and, to the extent required, to rectify and remedy the circumstances which had resulted in the CFMEU having been found to have committed contraventions of industrial legislation on an unprecedented scale and to have fostered criminal associations and allegedly engaged in serious criminal conduct. Once that is accepted, it follows that the restriction of freedom of political communication this involved should be seen to be an inevitable consequence or effect of the action to achieve Parliament's legitimate objectives.

401 In evaluating this question whether Pt 2A of Ch 11 is reasonably appropriate and adapted to achieve its legitimate ends it is also relevant to consider the nature of those ends. The circumstances with which the Parliament was confronted in respect of the CFMEU – the unprecedented scale of repeated contraventions of industrial legislation and the serious allegations of criminal associations within the C&G Division and of serious criminal conduct – make the objectives of (a) providing an effective and quick response to allegations of serious and extensive criminal and unlawful conduct and mismanagement by officers of the C&G Division and (b) swiftly restoring the effective management and operation of the C&G Division, in the face of the circumstances confronting Parliament, both rational and compelling.

402 As noted, the special case discloses that the CFMEU is a large and politically active registered organisation and, of the CFMEU Divisions, the C&G Division is by far the largest contributor in terms of membership, membership fees and other revenues, and voting power. Actual and alleged serious criminal, unlawful and improper conduct within the C&G Division goes to the heart of the CFMEU's capacity to function as a registered organisation and its capacity to satisfy the objectives of the FWRO Act, including to: "enhance relations within workplaces between federal system employers and federal system employees and to reduce the adverse effects of industrial disputation" (s 5(1)); "ensure that employer and employee organisations registered under this Act are representative of and accountable to their members, and are able to operate effectively" (s 5(3)(a)); "encourage the efficient management of organisations and high standards of accountability of organisations to their members" (s 5(3)(c)); and facilitate "the operation of the workplace relations system" (s 5(5)). Further, the construction and manufacturing industries in which the CFMEU is involved, it may be taken, are vital to Australia's economy and the well-being of its citizens and residents. Ensuring that the CFMEU is an effective, responsible and lawful participant in Australia's industrial system and in the industries in which the CFMEU is involved and combatting and remedying the risk of criminal infiltration

of its affairs is readily characterisable as an essential and necessary objective of importance to the nation.

403 Part 2A of Ch 11 also has other in-built safeguards against any unnecessary intrusion into the freedom of political communication. They include not only s 323K(1) (the effect of which has been described above), but also the legislative sunset provision in s 323E (providing that ss 323A, 323B, 323C and 323D cease to be in force on the fifth anniversary of the day the administration began under s 323A(1)) and s 323A(2) (which provides that the administration ends on the fifth anniversary of the day it began (unless ended sooner under s 323D)). Section 323D(1) and (1A) also enable the administrator to request the Minister to vary or revoke a scheme determined under s 323B(1) and if the Minister is satisfied that, having regard to the Parliament's intention in enacting the FWRO Act, the variation or revocation is in the public interest, the Minister must, in writing, vary or revoke the scheme. This power is subject to s 323D(2A), by which the Minister must not vary or revoke a scheme "before the third anniversary of the day the administration began, unless the administrator gives the Minister written notice that the administrator is satisfied that (for variation) the branch, or (for revocation) the Construction and General Division and each of its branches, is functioning lawfully and effectively".

404 In summary, in gauging the reasonableness of the means Parliament chose to achieve its legitimate objectives, it is relevant that: (a) Pt 2A of Ch 11 can achieve those objectives; (b) along the spectrum between a law directly restricting political communications and a law merely having some incidental effect of restricting political communications, Pt 2A of Ch 11 is somewhere in the middle; (c) there is no obvious and compelling alternative means to achieve the same objects, having a clearly less restrictive effect on freedom of political communication; (d) the circumstances with which the Parliament was confronted in respect of the CFMEU, in terms of an unprecedented scale of repeated contraventions of industrial legislation and serious allegations of criminal associations within the C&G Division and of serious criminal conduct, required swift and effective remedial action given the importance of the CFMEU to the Australian economy and the well-being of its citizens and residents, and to the effective functioning of Australia's industrial system; and (e) Pt 2A of Ch 11 has in-built safeguards against any unnecessary intrusion into the freedom.

405 For these reasons it must be concluded that Pt 2A of Ch 11, properly construed (including in accordance with s 15A of the *Acts Interpretation Act*), satisfies the second limb of the *Lange* test – it is reasonably appropriate and adapted to achieve its legitimate ends, objects or purposes of: (a) providing an effective and quick response to allegations of serious and extensive criminal and unlawful conduct and mismanagement by officers of the C&G Division; and (b) swiftly restoring the effective management and operation of the C&G Division. Accordingly, Pt 2A of Ch 11 can be described as suitable, necessary and adequate in its balance in respect of its legitimate objects.

Conclusion

406 Part 2A of Ch 11 of the FWRO Act, and therefore the Scheme, are not invalid by operation of the implied freedom of political communication.

Other challenges to validity

Extra-judicial punishment in contravention of Ch III?

407 The impugned provisions, which ultimately involved a focus on ss 323B and 323K(1) of the FWRO Act, do not infringe Ch III of the *Constitution* because they do not involve the imposition of punishment within the scope of exclusive judicial power. They are not prima facie punitive in character and, in any event, they are reasonably capable of being seen as necessary for the legitimate and non-punitive purposes described above.⁵³⁷

408 There should be no question that legislation effecting a transfer of the control of property and affairs of an organisation, terminating a person's employment, vacating an office held by a person, or restricting a person's capacity to hold certain offices can constitute extra-judicial punishment⁵³⁸ and thereby infringe Ch III of the *Constitution*, which permits the judicial power of the Commonwealth to be exercised only by Ch III courts. Part 2A of Ch 11 of the FWRO Act enables the imposition of each of these serious detriments on the C&G Division and the officers of that Division because, by s 323B(1), it empowers the Minister to determine a scheme for the C&G Division, if the Minister is satisfied that, having regard to the Parliament's intention in enacting the FWRO Act, it is in the public interest for the Division and its branches to be placed under administration. Further, by s 323B(3)(a), (b), (c) and (f), such a scheme must provide for, respectively, the person who is to be appointed as the administrator of the scheme under s 323C, suspension or removal of officers, declarations that offices are vacant, and the termination of employment of employees of the C&G Division or its branches. Once the C&G Division is placed under administration by the determination of the scheme and the appointment of an administrator, the other provisions of Pt 2A of Ch 11, including s 323K(1), operate according to their terms.

409 Contrary to the submissions for the plaintiffs, however, the enactment of Pt 2A of Ch 11 did not involve the Parliament in adjudging that the C&G Division or any of its officers had committed unlawful conduct for which they should be

537 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 12 [16], [18]; 419 ALR 457 at 468.

538 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 11 [14]; 419 ALR 457 at 467.

punished. As discussed, the circumstances which called forth the legislation included the courts having found that the CFMEU and some of its officers had committed contraventions of industrial legislation and the existence of serious allegations of criminal and improper conduct by the C&G Division and some of its officers. The Parliament did not and did not need to decide that these allegations had been proved to enact Pt 2A of Ch 11. The amelioration of and safeguarding against risk is central to the legislative function. That the Parliament was doing so in respect of the serious allegations, including of criminal infiltration of the CFMEU, is exposed by the Second Reading Speech, in which the Minister said that the "Australian government takes these allegations seriously".

410 Further, the provisions of Pt 2A of Ch 11 indicate the legislative intention that the administrator should conduct such investigations as may be required to ascertain the truth or otherwise of the serious allegations and any other issues of concern about the management of the C&G Division. Therefore, s 323HA requires the administrator, as soon as practicable after appointment as administrator, to establish, in writing, a complaints procedure and to take reasonable steps to publicise the procedure to members of the C&G Division and make the procedure publicly available (s 323HA(1)). The procedure must allow for the making of complaints in respect of conduct of relevant persons within the C&G Division that is or is alleged to be improper, unlawful or criminal (s 323HA(2)). The complaint recipient may refer a complaint to a law enforcement agency or regulator (including the Fair Work Ombudsman or the General Manager of the FWC) for investigation (s 323HA(5)). Otherwise, the complaint recipient must use best endeavours to investigate the complaint (s 323HA(8)). In addition, by s 323K(2A), the administrator may undertake investigations into past practices of the C&G Division and its branches. By s 323K(3) the "administrator also has the function of promoting compliance by the Construction and General Division with the laws (including workplace laws) of the Commonwealth, the States and the Territories".

411 In the face of these matters, the plaintiffs' submission that the Parliament must have determined that the C&G Division had engaged in unlawful conduct for which it and some of its officers should be punished is unsustainable. The circumstances are that numerous past contraventions of industrial laws have already been the subject of judicial determinations, and the serious allegations are proposed by the legislation to be the subject of investigation and may then be the subject of future judicial determination. If anything, therefore, the legislation recognises that it is for the judiciary alone to determine the existence of any contravention of law and the consequences of any such contravention including, if authorised, punishment of the contraveners.

412 Part 2A of Ch 11 also does not effect a forfeiture of the property of the C&G Division. It has been said that the "[f]orfeiture or confiscation of property, in connection with the commission of serious crime, has a long history in English

law".⁵³⁹ The essence of forfeiture of property, however, involves confiscation of property as a penalty or sanction for unlawful conduct.⁵⁴⁰ Part 2A of Ch 11 works a temporary (albeit not necessarily short-term) transfer of control of property unconnected to conceptions of penalty or sanction for unlawful conduct.

413 Nor can it be said that, by enabling the employment of officers to be terminated and their offices vacated and restricting the future roles of "removed persons", the legislation is a bill of pains and penalties. As has been said, laws can be so characterised if they bear two features, being "legislative determination of breach by some person of some antecedent standard of conduct" and "legislative imposition on that person (alone or in company with other persons) of punishment consequent on that determination of breach".⁵⁴¹ Again, neither feature is present in Pt 2A of Ch 11. That becoming a "removed person" as defined in s 323MA(1) of the FWRO Act, by operation of a scheme determined under s 323B(1), has further consequences including those specified in s 323MB (removed person must not become an officer or employee of a registered organisation without a certificate) and s 177A of the Fair Work Act (restrictions on removed persons being bargaining representatives) also is insufficient to characterise Pt 2A of Ch 11 as punitive.

414 The protective purpose of those provisions is evident from their operation. The restrictions in Div 2 of Pt 2A of Ch 11, accordingly, do not apply if the removed person holds a certificate under s 323MC or s 323MD as applicable. A certificate under s 323MC or s 323MD may be granted to a removed person on application by the FWC if the FWC is satisfied that the person is "a fit and proper person" to hold office in or to be employed by a registered organisation respectively. Further, s 177A of the Fair Work Act, which prevents a removed person being a bargaining representative, contains s 177A(7), which provides that the FWC may, on application in writing by a removed person, grant the person a certificate to be a bargaining representative, if satisfied that the person is a fit and proper person to be a bargaining representative. While the certificate provisions exclude the grant of a certificate if the removed person has been disqualified under a scheme and the period of the disqualification has not ended or at any time while the removed person is not eligible to be a candidate for an election, or to be elected or appointed, to an office in a registered organisation under s 215(1) of the FWRO Act (which disqualifies persons convicted of a prescribed offence from being a

539 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 416 [16].

540 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 414-419 [15]-[20]. See also *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 69-70; *Fardon v Attorney-General (Qld)* 223 CLR 575 at 654-655 [218]-[219].

541 *Duncan v New South Wales* (2015) 255 CLR 388 at 408 [43].

candidate for an election, or to be elected or appointed, to an office in a registered organisation), those exclusions are relatively narrow in scope and not in absolute terms. These safeguards ensure that the legislation is properly characterised as protective of the capacity of the CFMEU to function in a manner that satisfies the objects of the FWRO Act, and not to punish any person for unlawful conduct.⁵⁴²

415 For these reasons, Pt 2A of Ch 11 does not infringe Ch III of the
 Constitution. The detriments it imposes are not punitive. Part 2A of Ch 11 has
 legitimate objects and its provisions are reasonably capable of being seen as
 necessary to achieve those objects.

Acquisition of property on other than just terms?

416 Neither s 323K(1) nor s 323M of the FWRO Act authorises an acquisition
 of property on other than just terms.

417 If either provision authorises an acquisition of property, s 323S(1) provides
 that the "Commonwealth is liable to pay a reasonable amount of compensation to
 the person", which ensures just terms. Leaving aside the fact that the C&G
 Division is not a "legal person" separate from the CFMEU and otherwise taking
 the plaintiffs' arguments at their highest, s 323S(1) provides just terms for any
 acquisition of property by operation of s 323K(1) or s 323M(2) because it provides
 that the Commonwealth is liable to pay a reasonable amount of compensation to
 the person from whom property was acquired. If that person is the C&G Division
 (given its status as the holder of property under the CFMEU Rules and the C&G
 Division Rules), the fact that any compensation paid to the C&G Division during
 the administration will come under the control of the administrator by s 323K(1)
 does not mean that just terms have not been provided. On such payment of the
 compensation, it is the C&G Division which receives the compensation to its
 benefit. That the administrator controls how that money is to be used during the
 administration does not transform the just terms compensation into something
 other than just terms compensation.

No head of power?

418 This ground of asserted invalidity must also be rejected. Part 2A of Ch 11
 of the FWRO Act is a law with respect to s 51(xx) of the *Constitution* given that
 the CFMEU is a constitutional corporation and s 51(xx) supports laws to: prescribe
 "the industrial rights and obligations of [constitutional] corporations and their
 employees and the means by which they are to conduct their industrial relations";
 "regulate employer-employee relationships and to set up a framework for this to
 be achieved"; "authorise registered bodies to perform certain functions within that

542 cf *Victorian Chamber of Manufactures v The Commonwealth* (1943) 67 CLR 413
 at 416-417.

scheme of regulation"; and "require, as a condition of registration, that these organisations meet requirements of efficient and democratic conduct of their affairs".⁵⁴³

419 Further, and as the first and second defendants submitted, Pt 2A of Ch 11 of the FWRO Act does not stand apart from the balance of the Act. It adds another component to that part of the FWRO Act to ensure that the CFMEU, in its C&G Division, is swiftly restored to a state in which it is governed and operates lawfully and effectively in its members' interests and, thereby, facilitates the lawful and effective operation of the framework for the regulation of relationships established by the Fair Work Act and the FWRO Act between constitutional corporations and their employees and ensures that the CFMEU, in its C&G Division, can "meet requirements of efficient and democratic conduct of [its] affairs".⁵⁴⁴ Accordingly, it is not the case that, as the plaintiffs would have it, Pt 2A of Ch 11, in enabling the Minister to determine a scheme for the administration of the C&G Division and its branches if satisfied that, having regard to Parliament's intention in enacting the FWRO Act, it is in the public interest for the C&G Division and its branches to be placed under administration, involves no more than a discretionary value judgment of such breadth and flexibility to deny the tethering of the statutory power to s 51(xx) of the *Constitution*.

420 As the first and second defendants also submitted, there is no meaningful analogy in any respect between this case and the *Communist Party Case*.⁵⁴⁵ The *Work Choices Case*⁵⁴⁶ establishes that, while there is no head of power with respect to voluntary associations generally, a law with respect to such an association is supportable by another head of power, in this case s 51(xx). Nor is any constitutional difficulty presented by the fact that s 323B(1) of the FWRO Act depends on the Minister being satisfied that, having regard to Parliament's intention in enacting the FWRO Act, it is in the public interest for the C&G Division and its branches to be placed under administration. No analogy can be drawn between s 323B(1) and a law, for example, providing that "notwithstanding anything contained in the specific provisions of that statute, the Minister was empowered to make any decision respecting visas, provided it was with respect to

543 *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 114-115 [177]-[178], 121-122 [198], 153 [319]-[322].

544 *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 153 [322].

545 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

546 *New South Wales v The Commonwealth* (2006) 229 CLR 1.

aliens" as referred to in *Plaintiff S157/2002 v The Commonwealth*.⁵⁴⁷ The Minister's satisfaction as to the public interest in s 323B(1) is expressly confined by the objects of the FWRO Act.

421 *Spence v Queensland*⁵⁴⁸ also provides no assistance to the plaintiffs. The "sufficiency of the connection of a Commonwealth law with the subject matter of a conferral of legislative power can turn on questions of degree"⁵⁴⁹ and "consideration of the purposes which the law is or is not appropriate and adapted to achieve may illuminate the required connection to the relevant head of power",⁵⁵⁰ but this is in the context of a law that is "incidental" to the subject matter of a power.⁵⁵¹ Part 2A of Ch 11 of the FWRO Act, consistent with the reasoning in the *Work Choices Case*, is not such a law.

Conclusion and orders

422 The plaintiffs' challenge to the validity of Pt 2A of Ch 11 of the FWRO Act must be rejected. The questions of law should be answered as set out above. There should be no order as to costs.

⁵⁴⁷ (2003) 211 CLR 476 at 512 [102].

⁵⁴⁸ (2019) 268 CLR 355.

⁵⁴⁹ *Spence v Queensland* (2019) 268 CLR 355 at 406 [59].

⁵⁵⁰ *Spence v Queensland* (2019) 268 CLR 355 at 407 [63].

⁵⁵¹ *Spence v Queensland* (2019) 268 CLR 355 at 406 [59].

423 BEECH-JONES J. The questions posed by the special case, the circumstances in which they arise and the relevant provisions of Pt 2A of Ch 11 of the *Fair Work (Registered Organisations) Act 2009* (Cth) ("the FWRO Act") and the Determination made under s 323B of the FWRO Act⁵⁵² are set out in the judgment of Gordon J, which I respectfully adopt. I agree with her Honour's reasons in respect of all issues concerning the challenge to the validity of Pt 2A of Ch 11 and the Determination, save for those concerning the implied freedom of political communication. Nevertheless, I agree with her Honour that that challenge also fails.⁵⁵³

The implied freedom

424 The implied freedom of political communication is not a personal right but a constitutional restriction on exercises of legislative (and executive) power affecting political communications generally.⁵⁵⁴ The matters that may be the subject of such communications are broad, including communications "on a government or political matter"⁵⁵⁵ and the "wide range of matters that may call for, or are relevant to, political action or decision".⁵⁵⁶ The communications protected by the implied freedom are not just communications between political parties or candidates on the one hand and the electorate on the other, but political communications "between all interested persons";⁵⁵⁷ that is, political communications *from* all and *to* all.

425 Three questions arise where there is a challenge to the validity of legislation on the basis that it is inconsistent with the implied freedom of political communication:

- (1) Does the law effectively burden the implied freedom in its terms, operation, or effect?

⁵⁵² *Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024*.

⁵⁵³ As does the challenge to the validity of s 177A of the *Fair Work Act 2009* (Cth): see reasons of Gordon J at fnn 101, 131.

⁵⁵⁴ *Unions NSW v New South Wales* ("Unions No 1") (2013) 252 CLR 530 at 554 [36].

⁵⁵⁵ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 571, quoted in *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 52 [133].

⁵⁵⁶ *Australian Capital Television Pty Ltd v The Commonwealth* ("ACTV") (1992) 177 CLR 106 at 138.

⁵⁵⁷ *Unions No 1* (2013) 252 CLR 530 at 551 [27].

- (2) If so, are the purpose or purposes of the law legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government?
- (3) Again, if so, is the law reasonably appropriate and adapted to advance that legitimate purpose or those legitimate purposes?⁵⁵⁸

426 In *McCloy v New South Wales*, French CJ, Kiefel, Bell and Keane JJ described a method of addressing the third question by reference to a "structured"⁵⁵⁹ framework of "proportionality testing".⁵⁶⁰ This involves an inquiry into whether the law is: (i) suitable (in the sense of having a rational connection to its purpose); (ii) necessary (in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose that has a less restrictive effect on the implied freedom); and (iii) adequate in its balance. An inquiry into whether a law is adequate in its balance requires a value judgment, consistent with the limits of the judicial function, as to the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the implied freedom.⁵⁶¹

427 In *Babet v The Commonwealth* I agreed with Gageler CJ and Jagot J in relation to structured proportionality.⁵⁶² In circumstances where the parties framed their submissions in this case solely by reference to the approach in *McCloy*, I will apply structured proportionality as a "tool of analysis" and accordingly address suitability, necessity and adequacy. However, at least in this case an analysis of all those criteria reduces to the same point; namely, that the extent of the burden on the implied freedom imposed by the impugned provisions is that which follows from the (temporary) loss of member control over the affairs and assets of a division of a union and that this loss of control is a reasonable means of rendering that division lawful and effective (ie, the impugned provisions are reasonably appropriate and adapted to advance a legitimate purpose). Otherwise, nothing has emerged in this case or in *Babet* to warrant any reconsideration of the existence of the implied freedom.

558 *McCloy v New South Wales* (2015) 257 CLR 178 at 193-195 [2]. See also *Brown v Tasmania* (2017) 261 CLR 328 at 363-364 [102]-[104], 377-378 [162]-[163], 398-399 [237], 431-433 [316]-[325], 478 [481]; *LibertyWorks Inc* (2021) 274 CLR 1 at 53 [134].

559 *McCloy* (2015) 257 CLR 178 at 200-201 [23], 215-216 [74], 217 [78].

560 *McCloy* (2015) 257 CLR 178 at 193-195 [2].

561 *McCloy* (2015) 257 CLR 178 at 193-195 [2].

562 [2025] HCA 21 at [49], [242].

Approach to assessing validity of Pt 2A of Ch 11 and the Determination

428 The second question of law posed in the special case asks whether, inter alia, Pt 2A of Ch 11 is invalid because it impermissibly burdens the implied freedom. The third question is in the same terms but concerns the validity of the Determination made under s 323B within Pt 2A of Ch 11.

429 The Commonwealth and the Attorney-General of the Commonwealth ("the Commonwealth defendants") contended that the nature and extent of any burden on the implied freedom arising from Pt 2A of Ch 11 depends on the terms of any scheme that might be determined under s 323B and how any administrator might exercise his or her powers and functions. According to the Commonwealth defendants, it followed that questions 2 and 3 fold into a single inquiry into whether the making of the Determination exceeded the powers conferred by Pt 2A of Ch 11 because those powers are to be construed as not authorising the imposition of unjustified burdens on political communications.

430 Although it is not a difference of substance, I consider that the focus of the inquiry in this case is the validity of Pt 2A of Ch 11 and not the Determination. As explained below, the substantive features of a scheme determined under s 323B and Pt 2A of Ch 11 that bear on the assessment whether an unjustifiable burden is imposed on the implied freedom are: (i) the appointment of the administrator;⁵⁶³ (ii) the conferral on the administrator of broad powers of control over the affairs and property of the Construction and General Division ("the C & G Division") of the Construction, Forestry and Maritime Employees Union ("the CFMEU");⁵⁶⁴ (iii) the duties imposed on the administrator when exercising those powers (and other functions);⁵⁶⁵ and (iv) the mandatory inclusion in a scheme of administration made by a Determination of a power to alter the Rules of the CFMEU Construction and General Division and Construction and General Divisional Branches ("the C & G Division Rules").⁵⁶⁶ All administrators appointed under Pt 2A will have those powers and all schemes determined under s 323B will carry those features.

431 Schemes of administration determined pursuant to s 323B(1) must also provide for other matters such as the suspension or removal of officers and declarations that offices are vacant.⁵⁶⁷ The extent of such suspensions, removals and declarations may vary from scheme to scheme. However, even those officers

⁵⁶³ *Fair Work (Registered Organisations) Act 2009* (Cth) ("FWRO Act"), s 323A(1)(b).

⁵⁶⁴ FWRO Act, s 323K(1).

⁵⁶⁵ FWRO Act, ss 323K(4), 323K(5).

⁵⁶⁶ FWRO Act, ss 323B(3)(g), 323H.

⁵⁶⁷ FWRO Act, s 323B(3)(b)-(c).

who are not removed or suspended are subject to the direction and control of the administrator, not of the members of the C & G Division. As explained below, it is the members' loss of control over the affairs of the C & G Division and the other features just noted that are material.

432 Similarly, as will be explained, while the administrator is conferred with broad functions and powers, the exercise of those functions and powers is limited by duties that require their exercise in a manner that has regard to the objects of the CFMEU. Whether or not the implied freedom is unjustifiably impaired is not dependent on any particular exercise of any function or power by the administrator that is otherwise authorised by Pt 2A of Ch 11.

433 Thus, contrary to the Commonwealth defendants' submission, the power to determine a scheme under s 323B is not so broad as to permit some exercises of that power that are within constitutional limits and others that are not.⁵⁶⁸ Instead, all exercises of the power to determine a scheme under s 323B are either valid or invalid and that is so because Pt 2A of Ch 11 is either valid or invalid in its entirety in all its applications.

Is the implied freedom burdened by Pt 2A of Ch 11?

434 This first step involves asking whether the law in its legal or practical operation burdens the implied freedom.⁵⁶⁹ A broad view has been taken of the types of legislative measures that may burden the implied freedom.⁵⁷⁰ Thus, even though the making of a donation to a political party is not a form of political communication, a legislative restriction on such donations burdens the implied freedom because it potentially restricts the funds available to parties and candidates to meet the cost of their political communications.⁵⁷¹ Legislation restricting or regulating electoral expenditure directly incurred by third parties such as trade unions effects a greater burden on the implied freedom than limits on donations to political parties.⁵⁷²

568 cf *Palmer v Western Australia* (2021) 272 CLR 505 at 547 [122].

569 See, eg, *Tajjour v New South Wales* (2014) 254 CLR 508 at 560 [71], 578 [145].

570 *Unions No 1* (2013) 252 CLR 530 at 574 [119]; *Tajjour* (2014) 254 CLR 508 at 550-551 [37]; *McCloy* (2015) 257 CLR 178 at 230-231 [126], quoting *Monis v The Queen* (2013) 249 CLR 92 at 142 [108].

571 *Unions No 1* (2013) 252 CLR 530 at 555 [40]; *McCloy* (2015) 257 CLR 178 at 201 [25].

572 *Unions NSW v New South Wales* (2019) 264 CLR 595 at 607-608 [15]; *Unions NSW v New South Wales* (2023) 277 CLR 627 at 635 [7], 644-645 [30]-[34].

435 Of particular relevance to this case is that the implied freedom can be burdened by restrictions on freedom of association, including legislative limits imposed on the activities of associations and collective bodies. In *Australian Capital Television Pty Ltd v The Commonwealth*, Mason CJ observed that "[t]he efficacy of representative government depends also upon free communication on [political] matters between all persons, groups and other bodies in the community"⁵⁷³ and referred with approval to an observation that "[o]nly by freedom of speech, of the press, and of association can people build and assert political power, including the power to change [those] who govern them".⁵⁷⁴ While it has been held that there is no implied freedom of association independent of the implied freedom of political communication,⁵⁷⁵ "[a]ssociation for the purpose of engaging in communication on governmental or political matter is part and parcel of the protected freedom".⁵⁷⁶ Burdens on freedom of association can "result[] in a burden on the implied freedom of political communication".⁵⁷⁷

436 Although an assessment of the nature and extent of the burden is only relevant to the second and third stages of the inquiry,⁵⁷⁸ those matters are conveniently addressed at the point of determining whether the implied freedom is burdened. In this case, three particular features of the C & G Division and Pt 2A of Ch 11 warrant the conclusion that the implied freedom is burdened (and demonstrate the nature and extent of that burden), namely: the nature of the C & G Division's (and the CFMEU's) activities so far as political communication is concerned, the fact that those activities are ultimately conducted on behalf of the members of the C & G Division, and the duties imposed on the administrator in relation to the conduct by the C & G Division of those activities.

The C & G Division engages in and supports political communication

437 Part 2A singles out a division of a particular registered organisation of employees, namely the CFMEU, whose principal activities include engaging in political communication and supporting political communications by others.

573 *ACTV* (1992) 177 CLR 106 at 139.

574 *ACTV* (1992) 177 CLR 106 at 139, quoting Cox, *The Court and the Constitution* (1987) at 212 (emphasis added).

575 *Wainohu v New South Wales* (2011) 243 CLR 181 at 230 [112].

576 *Tajjour* (2014) 254 CLR 508 at 578 [143].

577 *Tajjour* (2014) 254 CLR 508 at 554 [46].

578 *Unions No 1* (2013) 252 CLR 530 at 555 [40]; *Tajjour* (2014) 254 CLR 508 at 558 [61]; *LibertyWorks Inc* (2021) 274 CLR 1 at 28 [63].

438 In *Williams v Hursey*⁵⁷⁹ Fullagar J observed that "for many years before the first Commonwealth *Conciliation and Arbitration Act* [1904 (Cth) ('the CA Act')] was enacted the trade unions of Australia were openly pursuing their objective of better working and living conditions not merely by industrial action but by the most active participation in politics". The active participation described by Fullagar J continued after the introduction of the CA Act and has continued up to the present day.

439 *Williams* upheld the validity of a political levy raised on members of the Waterside Workers' Federation of Australia to support the Australian Labor Party. The Federation was registered under the CA Act and its objects were found to authorise its "support by propaganda, and by financial subvention obtained by levy, [of] a political party whose professed ultimate aims, though at once wider in scope and more definitive in expression, are identical in essential character with its own".⁵⁸⁰

440 To be eligible for registration under the FWRO Act, an organisation of employees must be an association for furthering or protecting the interests of its members (as employees) and be free from control or improper influence of an employer or of an association or organisation of employers.⁵⁸¹ Provided the organisation meets that test and its rules otherwise comply with the FWRO Act⁵⁸² then, like the CA Act considered in *Williams*, the FWRO Act accommodates the pursuit of broad political objectives by trade unions.⁵⁸³

441 Consistent with this history and the FWRO Act, the registered Rules of the CFMEU ("the CFMEU Rules") specify that the CFMEU's objects include "uphold[ing] the right of combination of labour", doing "all things conducive to the welfare and organisation of the working class", "secur[ing] or assist[ing] in securing legislation for safety in or in connection with the Industries of the Union and for the general and material well being of members", "tak[ing] part in any or all questions of matters affecting or involving the wages and conditions of labour"

579 (1959) 103 CLR 30 at 59.

580 *Williams v Hursey* (1959) 103 CLR 30 at 60. See also *The Australian Workers' Union v Coles* [1917] VLR 332.

581 FWRO Act, s 19(1)(a)(ii), (1)(b).

582 See FWRO Act, Ch 5, Ch 11 Pt 7 Div 3.

583 FWRO Act, s 141(3).

and "rais[ing] political levies, donat[ing] to and/or affiliat[ing] with political parties".⁵⁸⁴

442 The CFMEU Rules establish three Divisions, one of which is the C & G Division.⁵⁸⁵ The CFMEU Rules are "binding on all Divisions, Branches, and Divisional Branches", including the C & G Division.⁵⁸⁶ Each Division has its own rules.⁵⁸⁷ The C & G Division Rules do not have any separate statement of objects but instead effectively adopt the CFMEU's objects. For example, the C & G Division Rules authorise the incurring of expenditure by the C & G Division and each of its Divisional Branches in furthering the objects of the CFMEU as set out in the CFMEU Rules, including those just noted.⁵⁸⁸

443 The special case records the CFMEU's affiliation, and involvement, with other trade unions and the Australian Labor Party. The special case also describes the recent involvement of the C & G Division and its Branches in political campaigns, as well as the C & G Division's participation in federal, State and Territory elections by incurring expenditure in its own right and making donations to various political parties and candidates. Either all these activities involve political communication or, at least, a restriction on those activities burdens the implied freedom of political communication.⁵⁸⁹

The C & G Division engages in and supports political communication on behalf of members

444 As a registered organisation, the CFMEU is a body corporate with a separate legal existence to its members.⁵⁹⁰ However, the C & G Division has no separate legal existence. Members of the CFMEU are assigned to a Division

584 Rules of the Construction, Forestry and Maritime Employees Union ("CFMEU Rules"), r 4.

585 CFMEU Rules, r 27(i)(a).

586 CFMEU Rules, r 26.

587 CFMEU Rules, r 27(iv).

588 Rules of the CFMEU Construction and General Division and Construction and General Divisional Branches ("C & G Division Rules"), rr 8(xi)(a), 14(iii), 25(i), 35(c), 35(e), 35(k).

589 *Unions No 1* (2013) 252 CLR 530 at 555 [40].

590 FWRO Act, s 27; *Burwood Cinema Ltd v Australian Theatrical and Amusement Employees' Association* (1925) 35 CLR 528 at 545.

according to their work or industry description.⁵⁹¹ Thus, at one level, the C & G Division is simply the collection of members of the CFMEU allocated to that Division under the CFMEU Rules and the C & G Division Rules.

445 As a matter of substance (or "practical effect"), to the extent that registered employee organisations and their constituent parts undertake political communications or donate funds to others to engage in political communications, they do so as the representative body of their members and under their control. The premise of the existence of a registered organisation of employees is that the members' interests as workers are better represented by combining and deploying their collective efforts and assets to pursue their common objectives. The FWRO Act furthers the perceived advantages of collective action through registered organisations by making provision for the democratic control of such organisations by their members, including by requiring organisations registered under the FWRO Act to have rules that provide for the election of the holder of each office in the organisation by way of either a direct voting system or a collegiate electoral system,⁵⁹² and by otherwise regulating the election of office holders.⁵⁹³ The democratic character of, and the perceived corollary advantages of collective action through, the CFMEU are reinforced by those parts of the CFMEU Rules⁵⁹⁴ and the C & G Division Rules⁵⁹⁵ which provide for the election of CFMEU, Division and Branch officials and members' participation in CFMEU, Division and Branch affairs.

446 Thus, it is not correct to contend, as the Commonwealth defendants did, that, because the members of the C & G Division could nevertheless engage in or support political communications in their own right or through another collective body, there is no relevant burden on the implied freedom of political communication occasioned by Pt 2A of Ch 11 (or the Determination). The appointment of the administrator impairs the members' freedom of association; it impedes their capacity to engage in political communication to further the common objectives of the body, of which they are members and which holds their joint assets and funds for the purpose of, relevantly, engaging in and supporting political communication.

591 CFMEU Rules, rr 7(i), 7(iv); C & G Division Rules, r 2.

592 FWRO Act, Ch 5 Pt 2 Div 2. See especially FWRO Act, s 143(1).

593 FWRO Act, Ch 7.

594 CFMEU Rules, rr 16, 17, 18, 48, 48A, 48B.

595 C & G Division Rules, r 38.

Administrator must give effect to CFMEU objects

447 One feature of Pt 2A of Ch 11, critical to its validity, is that in exercising control over the property and affairs of the C & G Division the administrator must "have regard to the objects of the CFMEU as defined in the" CFMEU Rules,⁵⁹⁶ including the political objects noted above.

448 Under Pt 2A of Ch 11, the administrator is conferred with the control of the property and affairs of the C & G Division and its Branches. While the legal entity that holds that property is the CFMEU, under the CFMEU Rules and the C & G Division Rules property and funds of the Divisions are managed and controlled by the relevant Division.⁵⁹⁷ The administrator may manage and dispose of that property as well as perform any function and exercise any power that the Division, its Branches, and officers may perform or exercise.⁵⁹⁸ The administrator also has the function of promoting compliance by the C & G Division with the laws of the Commonwealth, States and Territories⁵⁹⁹ and ensuring that its officers and employees comply with their obligations under the FWRO Act.⁶⁰⁰

449 In relation to these functions and powers and any other functions and powers of the administrator, s 323K(5) provides:

"In performing functions and exercising powers as administrator, the administrator must:

- (a) be satisfied the administrator is acting in the best interests of the members of the Construction and General Division and its branches; and
- (b) have regard to the *objects of the CFMEU as defined in the rules of the CFMEU* at the commencement of section 323A, so far as they are lawful." (emphasis added)

450 The first of these duties is awkwardly expressed but its effect is that the administrator must act in what the administrator considers to be the best interests of the members of the C & G Division and its Branches; a formulation that

596 FWRO Act, s 323K(5)(b).

597 CFMEU Rules, r 27(iii). See also C & G Division Rules, r 14(v).

598 FWRO Act, s 323K(1).

599 FWRO Act, s 323K(3).

600 FWRO Act, s 323K(4).

corresponds to a duty imposed on a fiduciary.⁶⁰¹ The second of these duties obliges the administrator, when performing functions and exercising powers, to have regard to the objects of the CFMEU as defined in the CFMEU Rules, including those objects noted above. The requirement to have regard to those objects means they must be "give[n] weight ... as a fundamental element" in performance of the administrator's functions and the exercise of his or her powers.⁶⁰²

451 These provisions enable the administrator to manage the affairs and property of the C & G Division by furthering the CFMEU's objects as defined in the CFMEU Rules, including the political objects described above, such as by making political donations. However, they are not merely facultative. The conferral of broad powers to manage the affairs and property of the C & G Division the exercise of which is subject to the duties in s 323K may warrant the characterisation of the administrator as a fiduciary vis-a-vis the members of the C & G Division.⁶⁰³ As such the administrator could not fetter his or her discretionary powers⁶⁰⁴ and would be under a duty to consider their exercise,⁶⁰⁵ doing so honestly and in good faith "upon [a] genuine consideration" of relevant matters by taking an informed view of whether or not they should be exercised.⁶⁰⁶ Absent the characterisation of the administrator as a fiduciary, the conferral of discretionary functions and powers on the administrator by statute carries with it

601 Finn, *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (2016) at 15; *Pilmer v Duke Group Ltd (In liq)* (2001) 207 CLR 165 at 196-197 [71], quoting *Norberg v Wynrib* [1992] 2 SCR 226 at 272.

602 *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329.

603 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96-97. In relation to officers of registered organisations, see *Allen v Townsend* (1977) 16 ALR 301 at 348-349; *Robertson v State Public Services Federation* (1993) 49 IR 356 at 363.

604 Finn, *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (2016) at 25.

605 *In re Gulbenkian's Settlements* [1970] AC 508 at 518; *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 204. See also Heydon and Leeming, *Jacobs' Law of Trusts in Australia*, 8th ed (2016) at 326 [16-07].

606 *Partridge v Equity Trustees Executors and Agency Co Ltd* (1947) 75 CLR 149 at 164; Heydon and Leeming, *Jacobs' Law of Trusts in Australia*, 8th ed (2016) at 326 [16-08].

at least an implied obligation to consider their exercise⁶⁰⁷ and they likewise could not be unduly fettered.⁶⁰⁸ In both respects, the administrator is subject to the supervision of the courts in the exercise of those functions and powers.

452 Section 323F potentially undermines the significance of the reference to the "objects of the CFMEU as defined in [its] rules" in s 323K(5)(b). Section 323F provides that the scheme for the administration determined under s 323B, any action taken under the scheme and an instrument of appointment of an administrator made under s 323C have effect despite any provision of the FWRO Act, Pt 2-4 of the *Fair Work Act 2009* (Cth) or the CFMEU Rules or the rules of any of the CFMEU's Branches or Divisions. This provision confirms the administrator's control over the affairs and property of the C & G Division notwithstanding any provision to the contrary in the CFMEU Rules and the C & G Division Rules. However, whether s 323F has any effect on the duties imposed by s 323K(5) beyond that depends on the scope of any scheme that might be made under s 323B.

453 The matters a scheme must provide for are specified in s 323B(3) and, as noted, include the suspension or removal of officers, declarations that offices are vacant and the timing of election of officers.⁶⁰⁹ A scheme must also provide for the alteration of the C & G Division Rules "*by the administrator* in circumstances where, because of the administration, the alteration cannot be made in accordance with any provision made by [the] Act (other than [Pt 2A of Ch 11]) or the rules".⁶¹⁰ However, neither that power nor anything else in Pt 2A of Ch 11 enables a scheme or an administrator to alter the objects of the CFMEU as defined in the CFMEU Rules as in force when Pt 2A commenced.

454 Further, if an administrator attempted to exercise the power conferred by a scheme to alter the C & G Division Rules to restrict the Division from being managed and its assets being deployed in furtherance of the objects of the CFMEU then the administrator's actions would be inconsistent with the obligation to have regard to those objects as required by s 323K(5)(b) and would mean that the administrator could not be satisfied that he or she had acted in the best interests of

607 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 1 at 34-35 [92], citing *Murphyores Incorporated Pty Ltd v The Commonwealth* (1976) 136 CLR 1 at 17-18, referring to *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189.

608 Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 7th ed (2022) at 300-302.

609 FWRO Act, s 323B(3)(b), (c), (d).

610 FWRO Act, s 323B(3)(g) (emphasis added).

members as required by s 323K(5)(a). The administrator could not amend the C & G Division Rules to eliminate so much of them that gives effect to the objects of the CFMEU when the administrator is obliged to exercise that power of amendment having regard to those very same objects.

455 Lastly, while the Minister has the power to include other matters in a scheme beyond the matters mandated in s 323B(3),⁶¹¹ that power could not be exercised to confer on an administrator powers to alter the CFMEU Rules or powers that are inconsistent with s 323K.

456 The end result is that neither a scheme made under s 323B, nor action taken under a scheme, nor the valid exercise of powers of the administrator conferred by any scheme made under s 323B(1) can remove or limit the administrator's obligation to administer the C & G Division in the best interests of the members and to have regard to the objects of the CFMEU as they existed at the time of the commencement of s 323A. As noted, those objects include the undertaking of various forms of political communication and making political donations.

The burden imposed

457 It follows that Pt 2A of Ch 11 burdens the implied freedom of political communication, but that burden is different to that which would have been occasioned had the C & G Division's assets simply been seized, had the Division been wound up or had the Division otherwise been removed from the CFMEU structure altogether. In such a case the nature and extent of the burden would include that which resulted from the C & G Division's affairs and assets no longer being able to be managed and deployed to further the political objects of the CFMEU.

458 Instead, the relevant burden is that which flows from the loss of the members' control over the management of the C & G Division's affairs and its assets, being the (significant) impeding of their capacity to meaningfully engage in political communication through the C & G Division or use the C & G Division's assets to donate to others to do so. As explained, the members are not without remedies against the administrator in that they can approach the courts to scrutinise the administrator's actions. However, recourse against an administrator akin to that available against a trustee with broad powers of management and control over property the subject of a trust is very different to exercising such management and control over a registered organisation and its property through elected officials. That recourse is no substitute for the level of control conferred on members (and their elected officials) over the property and affairs of the C & G

⁶¹¹ FWRO Act, s 323B(4A).

Division by the CFMEU Rules, the C & G Division Rules and the balance of the FWRO Act other than Pt 2A.

The purpose of Pt 2A

459 In *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* I noted that the purpose of a law can be identified at different levels of generality but the purpose broadly corresponds to the "mischief" the law seeks to address.⁶¹² I do not understand that approach to be different in substance to the approaches stated in the other judgments in *YBFZ*.⁶¹³ The purpose is to be ascertained from the "terms of the law, the surrounding circumstances, the mischief at which the law is aimed and sometimes the parliamentary debates preceding its enactment".⁶¹⁴

460 The Commonwealth defendants contended that the purpose of Pt 2A of Ch 11 was to enable the C & G Division to be returned swiftly to a state in which it is governed and operates lawfully and effectively in its members' interests for the goal of facilitating the operation of the federal workplace relations system. This purpose was said to be apparent from the provisions of Pt 2A of Ch 11, especially s 323B(1), which provides that, before determining a scheme for administration, the Minister must be satisfied that, having regard to the Parliament's intention in enacting the FWRO Act as referred to in s 5, it is in the public interest for the C & G Division and its Branches to be under administration. Section 5 of the FWRO Act recites Parliament's belief that workplace relations will be enhanced if employers and employees associations are required to meet the "standards" set out in the FWRO Act, which include standards of accountability.⁶¹⁵

461 The Minister must vary or revoke the scheme if, upon a request of the administrator, the Minister is satisfied that doing so is in the public interest, having regard to Parliament's intention in enacting the FWRO Act, as set out in s 5 of the FWRO Act.⁶¹⁶ However, the Minister cannot revoke or vary the scheme to end the administration for a Branch of the C & G Division prior to three years after the administration began, unless the administrator gives the Minister written notice that the administrator is satisfied that the Division and each of its Branches (for

⁶¹² *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 57 [245]; 419 ALR 457 at 529.

⁶¹³ (2024) 99 ALJR 1 at 20-22 [64]-[76], 29-32 [110]-[123], 47-50 [193]-[200]; 419 ALR 457 at 479-482, 491-495, 516-519.

⁶¹⁴ *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 26 [60].

⁶¹⁵ FWRO Act, s 5(2), (3).

⁶¹⁶ FWRO Act, s 323D(1), (1A), (1B).

revocation), or the relevant Branch (for variation), is "functioning lawfully and effectively".⁶¹⁷ The maximum period of administration is five years.⁶¹⁸

462 The Commonwealth defendants' contention as to the purpose of Pt 2A of Ch 11 is supported by these provisions as well as the duties imposed on the administrator described above. The existence of this purpose is also supported by the Revised Explanatory Memorandum to the Bill which, upon its passage, introduced Pt 2A of Ch 11 into the FWRO Act⁶¹⁹ ("the Bill"). The Revised Explanatory Memorandum referred to the existence of serious allegations of corrupt and criminal conduct on the part of C & G Division officials, and stated that the CFMEU had been the subject of established contraventions of federal workplace laws on more than 1500 occasions since 2003.⁶²⁰ The Revised Explanatory Memorandum also recited that the General Manager of the Fair Work Commission⁶²¹ had formed the view that the majority of the Branches in the C & G Division were no longer able to function effectively and "there were no effective means under the relevant rules to address the situation".⁶²² The special case recounts facts and circumstances that support those statements.

463 The plaintiffs did not dispute that at least *a* purpose of Pt 2A of Ch 11 is that contended for by the Commonwealth defendants and that such a purpose is legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative government. However, the plaintiffs contended that Pt 2A of Ch 11 had an additional purpose, namely the suppression of political donations and activity by the C & G Division, a purpose that is incompatible with the implied freedom.

464 To demonstrate this additional purpose, the plaintiffs referred to the history of the passage of Pt 2A of Ch 11 through Parliament, as described by Gordon J.⁶²³

617 FWRO Act, s 323D(2A).

618 FWRO Act, s 323E.

619 *Fair Work (Registered Organisations) Amendment (Administration) Bill 2024* (Cth).

620 Australia, House of Representatives, *Fair Work (Registered Organisations) Amendment (Administration) Bill 2024*, Revised Explanatory Memorandum at 2 [7], 3 [9].

621 *Fair Work Act*, Ch 5 Pt 5-1 Div 8.

622 Australia, House of Representatives, *Fair Work (Registered Organisations) Amendment (Administration) Bill 2024*, Revised Explanatory Memorandum at 3 [8].

623 See reasons of Gordon J at [131]-[138].

The high point of that history is the statements made in the Senate by opposition senators to the effect that they would not support the Bill unless it was amended to ban political donations made by the CFMEU.⁶²⁴ Other Members of Parliament later told the House of Representatives that they would vote in favour of the Bill because of written statements made by the third defendant, prior to his appointment as administrator.⁶²⁵ The plaintiffs contended that the Bill's history demonstrates that the banning of political donations was one of the objects that Pt 2A of Ch 11 sought to "achieve in fact".

465 A letter containing the statements made by the third defendant referred to in the parliamentary debates was attached to the special case. In that letter, the third defendant stated that he had determined a set of "principles and goals" to guide him should the Bill pass, and he be appointed as administrator. One of those principles was that the "union", presumably being the C & G Division, "will not engage in party politics during the administration: donations; positions at political party conferences; promotion of particular candidates". One of those goals was that, if he were appointed as administrator, he would vary the C & G Division Rules "to prohibit the making of party-political donations or the funding of party-political campaigns".

466 The references in the parliamentary debates to the third defendant's letter and its contents may suffice to enable the letter to be relied on for the purposes of ascertaining the purpose of Pt 2A.⁶²⁶ Assuming in the plaintiffs' favour that the letter can be relied on to ascertain the purpose of Pt 2A, it follows from the above that the letter does not properly reflect the effect of Pt 2A. The third defendant, as administrator, does not have the power to make an alteration to the C & G Division Rules to prohibit donations to political parties or the funding of party political campaigns. The third defendant cannot fetter his powers in managing the C & G Division's affairs and property by excluding the *possibility* of the C & G Division giving effect to the political objects of the CFMEU including by preventing the C & G Division from ever engaging in "party politics", taking positions at political party conferences or promoting particular candidates or parties (including making donations). Instead, the third defendant must give genuine consideration to whether it is in the interests of members to take those steps, although it must be

624 See, eg, Australia, Senate, *Parliamentary Debates* (Hansard), 15 August 2024 at 3091.

625 See Australia, House of Representatives, *Parliamentary Debates* (Hansard), 20 August 2024 at 5836.

626 See, eg, *Wong v The Commonwealth* (2009) 236 CLR 573 at 587-591 [43]-[53], 625 [185].

accepted that their capacity to obtain relief requiring the third defendant to take those steps is limited.

467 There is a difference between ascertaining the meaning and purpose of legislation with the assistance of extrinsic materials such as parliamentary debates and discovering the motives of individual legislators in voting in favour of that legislation. The former is the relevant inquiry and the latter is irrelevant. The starting point, and in some cases the end point, for ascertaining the meaning and purpose of legislation is the text and effect of the legislation. The secondary materials including the parliamentary debates may assist in ascertaining that meaning and purpose,⁶²⁷ especially where the text of the legislation is opaque, or it confers broad and unconstrained powers that could be exercised significantly and selectively to burden the implied freedom.

468 However, in this case, the parliamentary statements relied on by the plaintiffs do not rise above explaining why particular Members of Parliament voted in favour of the Bill. Those statements find no reflection in any part of the text of Pt 2A and throw no light on the meaning or effect of any provision of Pt 2A. To the contrary, those statements proceed on an incorrect understanding of the scope of the powers conferred on the administrator by the Bill upon its enactment.

469 It follows that the plaintiffs' submission as to the supposed (additional) purpose of Pt 2A of Ch 11 should not be accepted. The purpose of Pt 2A is as submitted by the Commonwealth defendants and that purpose is compatible with the implied freedom.

Is the law reasonably appropriate and adapted to advance its purpose?

470 The plaintiffs contended that, even if the Commonwealth defendants' submissions as to the purpose of Pt 2A of Ch 11 were accepted, Pt 2A was not suitable for its purpose, necessary or adequate in its balance.

471 In relation to suitability, Pt 2A of Ch 11 has a rational connection to its purpose. It provides a swift mechanism to address the unlawful actions of the C & G Division and a means of rendering the C & G Division effective, and limits the period in which that is to occur.

472 As for whether Pt 2A of Ch 11 is necessary, the plaintiffs contended that there was an alternative, reasonably practicable means of achieving the same purpose with a less restrictive effect on the implied freedom; namely, that provided for in s 323 of the FWRO Act. That provision enables an application to be made to the Federal Court of Australia for the approval of a scheme for the taking of action for the reconstitution of a branch of an organisation or to enable that branch

627 *Acts Interpretation Act 1901* (Cth), ss 15AA, 15AB.

to function effectively.⁶²⁸ The General Manager of the Fair Work Commission had already made such an application in relation to the C & G Division when the Bill was passed. The plaintiffs' submission to the effect that this method was a reasonably practicable means of achieving the same purpose as Pt 2A with a less restrictive effect on the implied freedom was premised on the administrator appointed under Pt 2A having the power to preclude the C & G Division from engaging in political activity. The plaintiffs contended that a scheme approved by the Court under s 323 could only have that effect if permitted by the Court to do so.⁶²⁹

473 For the reasons already explained, this submission overstates the administrator's powers under Pt 2A of Ch 11. The predecessor to s 323 enabled the Court to include in a scheme a power to amend the rules of a registered organisation if that amendment was necessary or appropriate to reconstitute the branch or organisation.⁶³⁰ Both a scheme for the taking of action imposed on a part of a registered organisation by the Federal Court under s 323(2), and a scheme determined under Pt 2A, remove control of the C & G Division from its members. However, neither form of scheme necessarily burdens the implied freedom any more than the other.

474 For similar reasons, Pt 2A of Ch 11 is adequate in its balance. While the extent of the burden imposed on the implied freedom is significant, it must be considered in light of the undoubted importance of the purpose of Pt 2A of Ch 11.⁶³¹ The only apparent and immediate means of addressing the C & G Division's unlawful actions and dysfunction is subjecting it to external control. The burden imposed on the implied freedom by Pt 2A is commensurate with that loss of control and Pt 2A goes no further in burdening the implied freedom than removing member control. Had Pt 2A gone further by, for example, enabling the taking of the steps proposed in the third defendant's letter, the outcome of this aspect of the plaintiffs' challenge may have been different. Neither the content of the parliamentary debates nor the special case suggests that any aspect of the dysfunction or unlawful behaviour of the C & G Division was related to its undertaking of political communication or its support of political communication undertaken by others. A legislative prohibition on that activity would not appear to be related to the purpose of Pt 2A of Ch 11.

628 FWRO Act, ss 323(1), 323(2)(a)-(b).

629 FWRO Act, s 323(4).

630 *Re Gallagher and Federated Cold Storage and Meat Preserving Employees' Union of Australasia* (1983) 51 ALR 657 at 662-663, 675-676.

631 *LibertyWorks Inc* (2021) 274 CLR 1 at 28 [63].

475 Part 2A of Ch 11 of the FWRO Act is reasonably appropriate and adapted
to advance its purpose, being a purpose that is compatible with the implied freedom
of political communication.

Conclusion

476 Part 2A of Ch 11 is valid in all of its applications. The Determination is also
valid.

477 The questions of law stated by the parties should be answered in the terms
proposed by Gordon J.

